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TO THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

MIDDLE WEST CONSTRUCTION, INCORPORATED,
Petitioner,

vs.

THE METROPOLITAN DISTRICT, Respondent,

No. 84.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The plaintiff prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on March 6, 1943.

STATEMENT.

This action resulting in the judgment entered by the United States Circuit Court of Appeals for the Second Circuit March 6, 1943, was brought in the United States District Court for the District of Connecticut on the ground of diverse citizenship, plaintiff being an Ohio corporation and defendant a municipal corporation organized under the laws of Connecticut.

The parties entered into a contract June 16, 1937 which called for construction by plaintiff of a section of an intercepting sewer in Hartford, Connecticut. The work was to be completed by December 31, 1937, and payment was to be made at unit item prices listed in the contract. The total cost of said section, so figured, came to $136,639.93, but

from this sum defendant deducted $3,540 under a clause in the contract providing for liquidated damages for delay in completion. The actual cost to plaintiff, according to its books, kept in regular course of business and in evidence, exclusive of profit, but including depreciation of tools, obsolesence and repairs, amount to $159,908.12. A reasonable profit on the work, including extras or new and additional work, is $40,000, making the total cost $199,908.12. It is the claim of plaintiff that various items of work were extras or were required by the engineer to be performed in a manner not contemplated by the contract and that consequently it is entitled to additional compensation and to additional time for completion of the sewer. The complaint contains fifteen (15) claims for extra compensation *under the terms of the contract,* or for *new or additional work, not within the scope of the contract, and upon which the minds of the parties never met, and as to which the terms of the contract do not apply,* aggregating $65,092; and one for recovery of the sum retained by defendant as liquidated damages, amounting to $3,540, as to which latter, no counter-claim was pleaded.

It is the claim of plaintiff that in the course of constructing said sewer, it encountered certain underground conditions, subsurface structures, and deviations from those represented to exist in the documents submitted to bidders, and upon the bases of which, it made its bid and entered into the contract. Defendant also gave verbal and written orders and instructions requiring plaintiff to construct parts of said sewer by methods and means, and consisting of structures vitaliy different in character and cost from those described in said documents which defendant refused to pay for, either as extras under the contract, or as new and additional work not within the scope of the contract, upon which the minds of the parties never met in making the contract. Some of the underground conditions and subsurface structures so found were unknown to exist by either when the contract was made; others were substantially dif-

ferent from those represented to exist when the contract was made; while still others were known by defendant to exist and that they would materially affect the work to be done, but were not disclosed to plaintiff, and were first encountered in opening the trench. As a result, plantiff suffered delays and extra expense in carrying the contract to completion.

Trial by jury was waived by stipulation and the case was tried to the court. The trial judge made a detailed, but incomplete findings of fact (R. 25-45); both parties then designated certain of the Evidence to be used on appeal, and by Order of the United States Circuit Court of Appeals for the Second Circuit, three (3) Transcripts of Evidence was made a part of the Record, without printing; and a like Order entered making all Exhibits a part of the Record without printing and without furnishing any copies thereof. (R. pp. 125-130). The trial judge denied recovery on all fifteen (15) claims, and entered judgment for plaintiff to recover $2200 on the claim for Refund of Liquidated Damages (R. pp. 25-47), and said judgment was affirmed by the said Circuit Court, and judgment entered therein on March 6, 1943. (133 F. 2d 468-470).

As the contract is a voluminous document, supplemented by four blue print plans; and the Transcript of the Record consists of the three (3) parts: Printed Record, Three Transcripts of Evidence, and all Exhibits, an intelligent presentation will necessarily be lengthy, so it is in the interest of brevity and clarity to incorporate them herein and make them a part hereof and to refer to relevant parts thereof in the supporting brief filed herewith, as they would necessarily have to be repeated in the argument to clearly expound the questions of law as to the proper construction of the contract and its application to the specific claims. There are also general propositions of law arising out of their construction and application in a discussion of which other parts are needed to clarify the points argued. A brief summary of general facts which were admitted or undisputed is as follows:

On May 11, 1937, respondent advertised for bids for this work, specifying they would be publicly opened at its office on May 25th, 1937; the contract, blue prints and specifications—herein called the documents—were furnished to plaintiff to furnish it with all the information necessary to enable it to figure its bid; they were based upon an investigation by respondent through its expert engineers and technicians over a period of time, beginning in 1934 and particularly in the Winter of 1936, and consisted of making testpits, taking borings, searching its own and utility records, maps and data concerning underground conditions and structures; consulting owners of property adjacent to the work concerning private sewers, drains and underground structures likely to be encountered in the trench or adjacent thereto; transferring this information to the blue prints in detail, all of which was done under the supervision of Mr. Willard S. Brewer, respondent's Engineer in Charge. Defendant expected and intended bidders would rely upon and act on these documents as the basis of figuring bids for the work, and knew that if they contained errors or mistakes a bidder would be at a disadvantage. (Mr. Brewer's Evid. p. 914); it did not expect bidders, in the time interval between advertising and bidding, to make an independent investigation of the underground conditions and structures, but only to examine surface objects and conditions visible to them along the trench or adjacent thereto; there is no practical way for a bidder to ascertain facts about subsoil conditions, and subsurface structures, as they would have to use the same sources of information and it did not expect them to do so, but to make their bids on the basis of the facts indicated on the documents. (Mr. Brewer, Ev. pp. 929, 968-970). Plaintiff relied upon these documents and submitted its bid of $136,239.75. (Ex. I). Other bids ranged from $139,000 to $250,000. (Ex. QQ). It was opened may 25, 1937 and was accepted as the lowest bid. On June 3, 1937, said Brewer wrote a letter to defendant's Manager, Ex. 22, in which he suggested as to several items that plaintiff's

bid was "unbalanced" so-called; this was shown to plaintiff's Manager, Mr. Paul Ciraci, and a reply Ex. 25 was made thereto, stating plaintiff was willing to "carry this contract through in accordance with the plans and specifications." Ex. PP shows without contradiction that by having submitted its bid as it did, plaintiff reduced its losses by $4211. The full contents of these three exhibits are incorporated herein.

The contract (Exhibit A) contained the usual exculpatory clauses (except one throwing all risk of loss on plaintiff by reason of "unforeseen difficulties" or unanticipated circumstances). For brevity, these clauses purport to throw all risks of loss on the contractor for everything encountered in the trench or concerning the work "whether shown on the plans or not"; "he shall do all pumping, drainage and exclusion of water from the trench" and "support, protect and maintain all pipes, conduits, sewers, drains of all kinds in the trench or adjacent thereto." (Ex. A, p. 28 (3); p. 49, par. 28; p. 50, par. 29; and others referred to by the Courts). These same provisions contain restrictive words, such as "which may be damaged by the work herein contemplated" (Ex. A, p. 49, par. 28); "in accordance with this contract and the specifications" (Ex. A, p. 28(3); and "in accordance with this contract and the specifications which are made a part hereof" (Ex. A, p. 20). The "Engineer to be judge" clause, Ex. A, p. 21, par. C, also restricts him to enumerated things "under this agreement." The provisions for "Changes and Extra Work, Ex. A, pp. 21-22, par. D, and other relevant provisions will be discussed under specific claims in the brief and are incorporated herein.

Plaintiff made two (2) requests for extensions of time to complete the work (Exs. U & V). Defendant promised to give due consideration when the work was completed, but instead assessed and retained the full amount provided in Ex. A, p. 24, pars. 2 and 3; no evidence was offered by it to show actual damages; and no counterclaim was pleaded

under Rule 13 (a) as required. In this, and as to all other claims it relied upon the *letter of the contract.*

Claim No. 1. Special Cradle Work. $22,626.

The first and largest claim is based on what is called *preformed cradle construction.* This was ordered to be used in *four areas* for a total distance of 1093′ and the dispute is whether this type of construction was an extra or was called for by the contract and whether it delayed the work and caused increased expense in labor and material because of its character and cost arising out of this method of construction.

Both Courts found it was Type C construction by reason of payment clauses found in Exhibit C, (R. pp. 33 and 133 F. 2d 469). These are: "If pile foundation under reinforced concrete pipe is ordered, concrete cradle and pile cap will be paid for under the item for Class-A foundation concrete." And "Type C construction will be paid for at the price bid for Type A construction plus the cradle concrete and plus reinforcing if any is used."

A comparison of the actual methods of constructing the type of construction specified in the documents follows: Type A is the simplest, and involves excavating the trench, laying the pipe on the bottom of it and backfilling with sand, earth, or a mixture of both; under types B-1, B-2 *and Type C,* the procedure was:

The head machine excavated the trench continuing progressively along the line of the sewer; laborers followed, dressing the bottom of the trench, placing sills, if used, at the required grade; the tail machine then lowered the pipe into the trench; concrete was ordered, and if any delay occurred in delivery, the crew continued to lay pipe, and no time was lost; joints were poured after placing concrete fill; each morning pipe laid the day before was backfilled and dressed over. Under this method continuous progress

was made, efficiently and orderly, utilizing the full crew on productive work.

In the Special Cradle Work ordered under *Exs. F* and *G*, the procedure was:

The head machine excavated one section, 30′ to 40′ long; the inspector was consulted and he ordered this cradle put in; the head machine, its operator and its signal man had no more work for the day on this machine, and worked as common laborers; a truck was sent for reinforcing steel; forms were built at sides of the cradle, and steel placed and wired; concrete was ordered, and if late in arriving the crew was necessarily idle; when concrete was placed, the surface was screeded (shaped boards to conform to the contour of the pipe were drawn back and forth by two men to shape the soft concrete) to the required form. As the length of each section was restricted by defendant to 30′ to 40′ per day, delays were caused when a section was completed too late to complete another that day. For the subsequent 2 to 7 days (the average curing period was conceded to be a minimum of 4 days in summer—Mr. Brewer, Ev. pp. 892-3), the concrete was kept wet to assure proper curing and when cured all dirt that fell into the trench was removed by hand and the cradle swept and rough spots cut by hand. The tail machine, which with its operator had done no productive work during the curing, placed pipe on the cured cradle. The pipe was then wedged up by hand to proper grade; surface of the cradle wetted, and grout mixed, poured and rodded, all by hand, until the entire space between cradle and pipe was solidly filled. The joints were then poured. This method was completely discontinuous, the crew disorganized and they worked inefficiently. Under the contract laborers were required to have 40 hours weekly, so they could not be laid off; and local labor conditions were such that those laid off found other jobs at regular time; they could not be used at other areas, as operating one crew at several locations would have been equally disorganizing and unproductive; additional equipment would

have been necessary to have sent them to other areas; the machines in use could not be moved to other places due to limited working space in most areas—fenced in, dykes, and other conditions. (Mr. Brewer, pp. 864-866). Systematic planning was impossible as plaintiff usually had to wait until the trench was excavated before the inspector ordered the cradle put in.

In addition to the indirect cost of these delays by the method of construction required here, direct expenses resulted because a much wider trench, usually more than 2½', had to be dug for the men to operate as described, increasing excavation, backfill and surface dressing about 75%; additional lumber, sand and cement for grout cost about 50¢ per linear foot. Mr. Brewer conceded that no wider trench, no greater backfill and no more landscaping were required for Type C than in A, B-1 and B-2 construction. (pp. 944-45). Demonstrations of the different types of A, B-1 and B-2 construction were also conceded by him to be correct. (p. 947).

A summary of Mr. Brewer's Evidence, pp. 870-884, shows: On June 30, 1937, he handed Ex. F to Mr. Ciraci; the latter stated that "grouting", that is, to lay the pipe on the preformed cradle, with a grouting, he didn't think was included —it wasn't specified in the plans; he stated this when he began to lay the pipe; "I said that method had been developed during this Metropolitan Sewerage work, and I had to admit that is wasn't specified concerning the grout on the plan. In fact, there was no description of that method of construction in the specifications . . . it was not described . . . It does not state the method of laying pipe on the precast cradle . . . " (pp. 870-884). "Mr. Ciraci said he could lay Type B faster than he could (this type) and for that reason would have liked to have laid it in some of these locations . . . In fact, on sills, he could lay faster than he could with the preformed cradle." (p. 881). The Court: "I understand that he did make some protest along two lines. The first was that he could lay Type B faster,

whatever name he may have used in describing it, and the other was that he was having to do extra work on the grouting." Mr. Brewer: "That is right . . . ".

Mr. Brewer knew of no place other than Hartford where precast cradle had been used; he intended to use preformed cradle in the areas ordered without reference to subsoil conditions although he admitted there was nothing in the documents to call attention to bidders of that fact, except Types A, B and C, and general statements in the payment clauses (pp. 939-942). Ex. G was handed to Mr. Ciraci by Mr. Brewer about October 26th, 1937, and is another detailed drawing of a double 39″ cradle ordered by defendant and constructed by plaintiff for about 182′ North of No. 2 Crossing. In each of these, Exs. F and G, "grout", a stiff mixture of sand, cement and crushed stone, is shown between the cradle and the pipe. There was no grout shown on the documents submitted to bidders. Grout indicates that the cradle had to be performed. (pp. 946-947). It was undisputed that no pile nor pile caps were used throughout the entire work. No reference was made in the documents that defendant had required the use of preformed cradle in three other contracts.

Plaintiff claims that it made protests to Mr. Brewer concerning this preformed cradle work at the very beginning, and Mr. Brewer promised that if anything that the defendant ordered was an extra plaintiff had no need to fear as it always paid contractors fairly for extra work ordered by it; and that this was confirmed by later conversations. (Ex. H. pp. 2 and 3). Other admitted or undisputed facts will be set forth in the brief, which are incorporated herein.

Claim 2. Extra Pumping. $8345. Compl. 8.

The District Court's Memorandum is found in the Printed Record, pp. 36, 37, and decides, as a matter of law, that Ex. A, p. 50, par. 29 exonerated respondent from liability, and the claim clearly untenable; that from the notations on the

plans and the "personal examination by Mr. Ciraci of all the terrain before the bid was made, there seems no excuse for a misunderstanding here." *Later the trial Court applied this principle to other underground structures and conditions.* This decision was upheld on appeal and on the further ground that before the contract was signed, Mr. Ciraci knew there was no outlet at Farmington Avenue, and the claim was untenable. The Findings of the trial Court do not support the Circuit Court's decision, as the Finding and Conclusions of law are based *solely* on "the personal examination of the terrain" by Mr. Ciraci and *omits any findings as to Mr. Brewer's promise that this outlet would be ready in about 6 weeks after work on this contract was commenced.* Both Mr. Buck and Mr. Ciraci interpreted the "dotted lines" as indicating and representing an "existing outlet" through which water (Mr. Buck, p. 916-7; Ex. H, pp. 21-23), would have drained by gravity—in a gravity sewer.

This interpretation respondent did not dispute, but asserted that it would not have permitted it to be used to drain this water, although it admitted *there was nothing in the documents submitted to bidders to indicate such fact, or that water would have to be pumped, or that it was dead end nor anything to indicate to a bidder that it was not available. Mr. Brewer testified he though it would have have been better and fairer to have made some such notation on the plans.* (Evid. p. 915); an outlet is of tremendous importance (916); and that at no time did petitioner have an outlet until construction was nearly complete, about which nothing was said in the plans (918); and that good engineering practice is to construct from low to high ground so as to get drainage (920); no reference was made to contract No. 16 as being incomplete or under construction or anything that would give notice that there was no outlet except the specification "that the contractor must take care of all drainage." (917) Ex. B bears notations "Beginning of this contract" — "End of contract." (Seemingly, the Courts interpreted this as notice that No. 16 was incomplete,

whereas we claim it simply means the *dividing point* between the work under these contracts). Mr. Brewer testified that from Farmington Avenue to Asylum Avenue (where the extra pumping was done) there was no outlet to the river. (934). There was nothing in the documents submitted to bidders to indicate respondent expected the work in the low ground to be done in Summer. (p. 931). By putting the River Crossings first, any outlets to the river were cut off. Respondent required these crossings to be done before the work between Asylum and Farmington Avenue was begun. (p. 933). There was no information to bidders to indicate how this item of pumping would be affected other than a general reference to this project being part of a larger project (pp. 914-4); the usual good engineering practice is to construct from low to high ground (p. 920).

Mr. Buck testified that good practice and fair treatment of contractors dictate the plans should include all information, so a contractor could make an intelligent bid and analyze what the engineer would require him to do, without which it is impossible to make a reasonable estimate (p. 768); the plan, where no outlet exists, should be noted as such to apprize contractor of what he has to do; it is good engineering practice to construct from low to high ground (p. 769); it is very important to have an outlet and explains reasons (770); if no outlet exists, it would considerably increase the cost (p. 772); and in this particular case where the underdrains were picking up and discharging water right at the point where contractor is digging the trench and laying pipe, it would increase the difficulty of his work immeasurably (p. 770); under other circumstances, all such water is automatically carried away by the completed section of the sewer, so all a contractor has to do is to pump the water which actually comes out of the ground in the trench he has opened and in which there is no sewer; a small pump at the front of the pipe then passes that back into a few lengths of pipe and it flows away down the sewer (p. 770); the work would be disrupted and disorgan-

ized by these items of extra work; the *standard clause about pumping the water did not include this item in the prices bid—only pumping and keeping his working point dry where he was laying the joints;* there is nothing in this clause to require contractor to pump, at no extra cost, water collecting in the trench because of no outlet, (p. 805-6); the sewer here was gravity flow and naturally would carry off the water through an outlet had it existed. (p. 803-4).

In every other place, where petitioner had experience, such an outlet, as indicated here, could be used to drain the trench (Mr. Ciraci, p. 377); he made no protest about the increased cost because, before this work was done, Mr. Brewer had told him that anything he did extra would be paid for; he relied on Mr. Brewer's promise that the outlet would be ready in six weeks and made his plan of operations accordingly, (pp. 382-387); he relied on Mr. Brewer's word because he thought he could believe the Engineer in charge (p 386); a ball cap could have been placed at the outlet to catch dirt and other objectionable things and keep them out of the sewer. (p. 386). Had Mr. Ciraci known no outlet would be available until the job was done he would have withdrawn the bid (Mr. Ciraci, p. 751).

The Printed Record, together with the Evidence and Exhibits are made a part hereof for brevity as well as other facts set forth in the Brief.

Claim 3. Conflict with Underground Structures. $11,835.

The District Court's Memorandum is found in the Printed Record p. 37, and respondent is erroneously exonerated from liability under Ex. A, p. 28(3) stating that the "price bid includes full compensation for removing or protecting, without cost to the District", all such pipes or obstacles, whether shown on the plans or not; and p. 49, where the contractor agrees to do everything necessary to protect all such pipes and drains, without cost to the District, and the notation on the blueprints that the plans were not warranted to be

"even approximately correct." This the Circuit Court upheld (133 F. 2d 470, par. 4). Both Courts arrived at their conclusions as a matter of construction of the contract, *a question of law,* and that no recovery could be had under the contract as no written claim had been made as provided therein.

This claim involves five (5) items:

1. On Ex. C, a 4″ gas pipe is shown lying outside the *east line of the sewer* in the southerly part of Woodside Circle; as encountered, it was a *little to the west of the center of the trench* and had to be *moved,* as directed by respondent, for a distance of 400′, in 100 feet sections, so petitioner had to dig a trench at the side of the pipe to the depth of the gas pipe and finish the bottom by hand. Each section took 1 day's work; the gas company removed the pipe the next day and petitioner back-filled the trench so he could further excavate by machine—an additional day's work—or a total delay of 8 days; at Station 81/100 the gas company *made a loop* offsetting the pipe to the east, running the pipe north some distance and then diagonally across the sewer to the west side where it was connected with the existing pipe. *It was necessary to excavate by hand here, delaying the work 2½ days. No loop was indicated on the documents submitted to bidders.* The gas company sued for and recovered damages from petitioner and the case was settled for $225. Beyond this point the sewer was moved east to miss the gas pipe, and for another 500′ the machine excavating the trench had to operate off-center on account of the proximity of the east curb, *which slowed and materially delayed the progress of the work for 11 days,* all in addition to normal time of doing it. The *most the plans indicated* was that this pipe might be *close to the trench* and have to be *supported,* but not *removed* and *replaced,* as was done. (Evid. p. 479-482). Respondent's testimony here was vague and shows scant knowledge of the difficulties encountered (pp. 956-8); 1018-1020). Petitioner's detailed statement of

Claim No. 3 is found in Ex. H. pp. 25-28, and *shows additional costs of $11,835.* The District Court held that *no recovery could be had on this claim because it involved underground structures and was covered by the same legal principles of construction as Claim No. 2, where the personal examination by Mr. Ciraci exonerated respondent from liability.* (R. p. 37).

2. At the northerly end of Woodside Circle an 8′ water main is shown on Ex. C *crossing* the line of the sewer. As *encountered it was found to lie directly over the sewer for 80′,* and it was necessary to excavate *much wider to provide room to let it down into the trench.* It also *had to be permanently shored up* to protect it from settlement. 8 day's delay was caused thereby.

3. A stone foundation of an old house buried 1′ beneath the soil was encountered; *neither party knew of its existence until encountered.* It was 25′ long, 6′ deep, and 2½′ wide, and had to be cut up by air hummers and removed; as this was residential section and utilities such as gas, water, etc., existed underneath, explosives could not be used. *Delay 2 days.*

4. At the northerly end of Woodside Circle respondent required petitioner to build concrete foundations under a sewer pipe 190′ long by 2′ wide by 5′ deep, using 70 cu. yds. of concrete *in forms,* not covered by Item 8, p. 79, Ex. A, but by Item 15. The difference in cost is $525.

5. *This and the preceding 4 Items of Claim No. 3 made it necessary to open up a greater width of paving than would have been required under the plans and specified,* and in places respondent required pavement not damaged to be refinished. Extra cost, $566.62.

Claim 4 Stone Foundation. $428.

This is a relatively small claim for stone foundation that worked into soft soil. It is an *extra* under the terms

of the contract. The District Court rejected it because of Ex. A, p. 46, par. 16 requiring the removal of soft soil. (R. p. 38) However, the same paragraph states that such soft soil so removed shall be replaced by crushed stone; and paragraph *17* Ex. A, p. 46 provides for payment for such stone.

Claim 5. Testing River Crossings. $2281.

All River Crossings were admittedly constructed in exact accordance with details shown on Ex. E, Sheet 4, and covered by specifications, Ex. A, pp. 73-76 *pars.* 89-97, *inclusive.* Respondent's Engineer admitted that he supervised these crossings; knew what was done every day—ordered them to be placed on stone foundations; that in the course of construction they showed settlement; that a stone foundation, in his opinion was sufficient; and there was no complaint as to workmanship or materials and he was satisfied with it. (Mr. Brewer's Evid. pp. 955-6). Ex. A, p. 53, par. 40, authorized the Engineer to reject faulty materials. The testing of three crossings was not requested by respondent, under Ex. A, pp. 68-9, *until completed and backfilled and it increased the expense and difficulty radically to wait until all this has been done.* (Mr. Buck's Evid. 778-80; Ex. H, pp. 30-32); and it was undisputed that good engineering practice requires testing to be done when the joints are made, and before closing chambers, back-filling and otherwise completing the work. (Mr. Brewer's Evid. pp. 895-7; 778-80). In waiting an unreasonable time to require the testing the respondent *waived* same and is estopped to refuse payment.

Claim 6. Private Drain. $175.

A private drain the existence unknown to either party, until encountered, had to be moved. The District Court refused recovery because it was an underground structure, subject to the same considerations as in No. 3 (R. p. 38).

The Court on appeal did not discuss, specifically, any claims except Nos. 1, 2, 3, and 15. It is purely a question of law as to the proper construction of the contract.

Claim 7. Additional Lumber. $575.

Petitioner left in place 155 thousand board feet of lumber because, in Mr. Ciraci's opinion *removal would endager the new sewer and existing structures,* which the District Court held an unauthorized act, since the contract committed this judgment to the Engineer under Ex. A, pp. 45, 46, pars. 14, 15. The latter part of the same paragraph 14, states: " . . . but it is expressly understood and agreed that the ordering in, or failure to order in, said sheeting and bracing, shall not relieve the contractor from the responsibility for any damages whatever due to the failure of said sheeting or the settling of the filling of the trench, or of the ground adjacent thereto." It is a question of law and depends on the construction of the contract.

Claim 8. Reinforcing Steel. $199.

Item 16 Ex. A, p. 81—a special provision—provides for payment of all reinforcing steel in special structures, and any additional steel, if any is ordered. Respondent admitted about 600 lbs. were ordered but not paid for by it (p. 1006). It is, however, a small item.

Claim 9 Sewer Conflicts. $1243.

The Condensed Statement (R. pp. 66-67), supported by Mr. Ciraci (Ex. H, pp. 38-40), Mr. Buck's evidence (pp. 785, 810-811) and respondent's Inspector, Kilby, (p. 1093-5) shows that petitioner built at least 2 bulkheads when the plans required only one. The other part of the claim is based on breaking out and pressure grouting the old sewer because the "inside dimensions" were shown, contrary to good engineering practice, *as there was no note that the old sewer would have to be cut away and pressure grouted,* (Mr. Buck, pp. 785, 810-811).

Claim 10. Pumping Sewage. $299.

Respondent paid for the bypassing of a private drain on the Day property as an *extra* (Ex. 6) but refused to pay for pumping the sewage which flowed from it while it was in existence. *Neither party knew of the existence of this drain until encountered in the trench.* The District Court held Ex. A, p. 50, par. 29, exonerated respondent from liability.

Claim 11. Diverting Old Sewer. $325.

At Station 53/70 the existing 27″ brick sewer first conflicted with the construction of the new sewer, and Mr. Brewer ordered the sewage from it diverted to the river; No. 3 gang worked all of one day making this diversion and four laborers the next day to make a connection at the manhole. Respondent admits 90′ were relaid, while petitioner claims for 130′. The District Court excluded the claim under Ex. A, p. 50, par. 29.

Claim 12. Tunnelling under Trees. $1225.

Petitioner was directed by respondent to tunnel under a 2′ oak tree on the Williams property, by driving a sheathed tunnel 50′ underneath it; respondent claimed it was a cap and leg tunnel, and that it was only for 12′. A sheath tunnel and a cap and leg are the same (Mr. Kilby p. 1129). *It was undisputed that no tunnel* work was shown on the plans at this point. The District Court held that Ex. A, p. 76, par. 98, provided for tunnelling where necessary to avoid damage to trees or roots.

Petitioner claims, under Ex. A, p. 77, par. 100, respondent expressed *its intention for owners to remove trees,* and claims under Item 1, Ex. A, p. 13 at the unit price bid of $40 per linear foot. Respondent paid for it under Item 2A, at $15.50 per linear feet. The difference is $1225.

Claim 14. Special Foundation Seal. $1843.

This claim is based on hand-mixing and spreading special concrete *fill* for a distance of about 2345 feet where ordered as a fill as the quantity needed at any one time was too small to order ready-mixed and chuted into the trench as contemplated in the documents. The District Court found respondent's records show at least 1122.5 feet of this type used on the job (R. p. 40). Where none of this fill was ordered, three pipe were laid at a time using the tail machine and one-half the crew; pipes were lowered into the trench, set to grade, and the work proceeded—occupying about 45 minutes; but where this fill was ordered, it was necessary to *mix concrete by hand, lower it into trench, spread it, remove the bucket, pick up the pipe and set it in place on the concrete and the procedure repeated for each three pipe.* This work was all in very deep cut where all material had to be handled into the trench by crane—the procedure for each three pipe took about 2 hours. The pipes were 8′ long, and 97½ operations times 1¼ hours delay equals 15¼ days, but computed only against one-half of gang No. 1 without job overhead, making $1843.01, including profit of 15%.

The District Court construed Ex. C as authorizing the Engineer to order it under Ex. A, p. 46, par. 17; we claim payment under Item 9, p. 79 of Ex A, a "Special Provision", and Ex. C which specifies a "minimum thickness of fill of 6″. The same result would be reached by Ex. A, p. 71, par. 82 construed with Ex. C (Mr. Buck, pp. 816-17) (Ex. H, pp. 45-46).

Claim 15. Winter Work. $14,205.

Mr. Ciraci, after studying the plans, specifications and the site of the work, the organization of crews, and based on his long previous experience, expected to complete the work by December 1, 1937, but *by reason of the various delays hereinabove set forth,* did not actually complete it until April 1, 1938, doing work in inclement weather, floods, cold and

other winter conditions, which *increased the costs* of it *by the amount of rental of equipment* for periods when work was stopped by weather conditions, and the *increased costs* for prosecuting it *under unfavorable conditions, and for which no other claim for additional compensation for delay has been before made.* Ex. H, pp. 47-48, shows in detail the computation of delays and costs as to each gang, and the period when each gang was discharged, after *deducting Sundays, holidays* and *any days of useful work* done by any such gang, *job overhead* and *all other items which might duplicate each other.*

The efficiency of the men is figured at 50%, while defendant's testimony shows its figures based on 75% efficiency. Petitioner excluded Gang 2 from its computation because it was computed in Claim No. 1; and Gang 4 because it was not delayed in doing sheltered tunnel work. Job overhead is included for only Gang 1. A summary of these details results in Gang 1 being delayed 34 days at $284.93, or $9687.62; and Gang 2, 22½ days—without job overhead—at $118.43, or $2664.67, Total $12,352.29, plus overhead and profit at 15%, Grand Total, $14,205.13. The District Court found the delays not to have been due to any deviation from the terms of the contract, (R. p. 41) and the Circuit Court agreed with its construction. (133 F. 2d 470, par. 5).

Claim 16.

The claim for refund of liquidated damages is based on our claim that the delays until April 1, 1938 proximately resulted from extra work ordered by defendant. In addition we claim that, respondent not having *counterclaimed* or cross-complained under *Rule 13 (a) of the Rules of Federal Procedure, all of the liquidated damages retained by respondent* should have been included in the judgment; and respondent *waived its rights* to retain them by not filing such a pleading. No evidence was introduced by respondent to show *actual damages and no actual damages appeared to have been suffered by it.* As our claims are for new and

additional work, delaying completion during the construction, Ex. A, par. I, page 25 does not apply and full recovery should be allowed.

QUESTIONS OF LAW PRESENTED.

May plaintiff, who claimed recovery on two (2) broad theories, recover under either of them, or partly under both?

These theories are:

1. May it recover outside of the contract on the basis of:

(a) Quantum meruit;

(b) New and different work, not governed by the contract provisions, and despite such provisions;

(c) On an implied contract, in law or in fact;

(d) Estoppel—including promissory estoppel;

(e) Unjust enrichment, where the status quo cannot be restored;

(f) Misrepresentation or fraud, actual or constructive;

(g) Mistake, mutual or unilateral;

(h) Breach of contract, restitution in damages, reformation by damages, breach of an implied warranty, in the nature of a breach of warranty;

(i) Unforeseen difficulties or unanticipated circumstances encountered for the first time in the trench, which makes it inequitable to throw the loss on plaintiff;

(j) Waiver, or estoppel and waiver combined;

(k) Concealments and non-disclosures;

(l) Quasi-contract, or other legal or equitable principles?

Or,

2. May it recover under the contract on any of the following tenable legal or equitable theories, despite the numerous exculpatory provisions, Exhibit A, pp. 8 (1) and (m); p. 13; p. 21, par. C; pp. 21-22, D (1) and (2); p. 28(3); p. 50, (29); and other provisions referred to in the decisions

and made a part hereof, inserted by defendant, the purpose of which was to throw upon plaintiff the assumption of all risks or loss—except risks or loss due to unforeseen difficulties or unanticipated circumstances, not contemplated by the parties when they made the contract—unless such provisions were strictly complied with to the letter, on the basis of:

(a) Waiver or estoppel, or both combined;

(b) A new or independent contract;

(c) Promises of additional compensation;

(d) Misrepresentation, innocent or otherwise; fraud, actual or constructive; mistake; breach of contract; breach or an implied warranty; in the nature of a breach of warranty; authoritative and misleading statements; restitution; reformation and damages;

(e) Unforeseen difficulties or unanticipated circumstances (as above);

(f) Any other legal or equitable theory which was claimed below?

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals clearly erred:

1. In failing and refusing to follow the local laws of Connecticut on important questions of law, as laid down in the applicable decisions of its highest tribunal, the Supreme Court of Errors, which formed a material part of the contract, was embodied by implication, and the decisions of which are controlling as to the construction and application of the terms of the contract.

2. In failing and refusing to follow the applicable decisions of the Supreme Court of the United States.

3. In failing and refusing to follow the applicable decisions of said Second Circuit, and the decision is in conflict with the applicable decisions, the modern or better reasoned cases or applicable decisions of other United States Circuit

Courts of Appeals relative to the general law governing the construction of contracts.

4. The decision herein is contrary to the applicable weight of authority, modern authorities or better reasoned cases as to the general law governing the construction of contracts.

5. In accepting the findings of the trial court because they were clearly erroneous, in that said trial court erroneously held that the questions herein presented are primarily those of fact, that the principles of law do not seem doubtful, and that said principles of law claimed by plaintiff were inapplicable, when the problems presented were, in their essence, questions of law and reviewable on this petition by this Honorable Court.

6. In accepting the conclusions of fact of the trial court and adopting its conclusions of law based on said conclusions of fact and giving effect to same, because they are clearly erroneous, illogical, unreasonable, arbitrary, contrary to the admitted or undisputed facts, against the weight of the evidence, based on a strained interpretation, construction and application of the contract, plans and specifications, which renders it contrary to business sense and imposes upon plaintiff risks and losses that are inequitable, oppressive, overreaching, unduly onerous and impractical from a commercial standpoint — consequences not reasonably within the contemplation of the parties when the contract was made.

7. In holding that the contract is very clear that the plaintiff was to assume the risk of encountering underground structures and conditions, whether shown on the plans or not, and was to do everything necessary with respect to them without additional expense to defendant, in that it completely overlooks or disregards the restrictive clauses and special provisions contained in the contract, as well as the real expressed intention of the parties when they entered into it, interpreted, construed and applied in accordance with the

applicable decisions of Connecticut, and the general law, in a practical business way, and in a way to avoid injustice, hardship, oppression, loss to plaintiff, and forfeiture of increased cost of constructing the work, as it is conclusively presumed that both parties intended their contract to be fair and just in its operation and effect.

8. In holding, in effect, that by reason of two letters, Exhibits 22 and 25, plaintiff assumed all risk of encountering underground structures and conditions, whether shown on the plans or not, or any additional or different increased risks than those contained in the contract; and in approving a holding of the trial court that notwithstanding the specific warning it erroneously construed to be embraced in Exhibit 22, affording plaintiff an unusual locus poenitentiae, it pressed on to the indicated outcome; especially when defendant did not plead a modification of the contract, nor that plaintiff assumed any additional risks thereto, and made no such claim at the trial.

9. In failing to hold that Exhibit 25 expressly provided plaintiff was willing to enter into the contract and to perform same in "accordance with the plans and specifications" and defendant so understood it; and that inasmuch as both said Exhibits pertained to negotiations prior to the contract, and were not mentioned nor referred to therein, they formed no part of the contract, and were of no legal effect to modify or change the terms of the contract.

10. In failing to hold that the purpose of defendant in introducing said Exhibits was solely to show that plaintiff's losses proximately resulted from its so-called "unbalanced bid", and that plaintiff having shown without contradiction, that by reason thereof, (by computing the actual quantities of materials used at the unit item price) it had actually reduced its losses by $4211, defendant had failed to sustain the burden of proof, and none of plaintiff's losses were sustained on account of any specific warning in Exhibit 22, and said exhibit was of no further legal effect.

11. In holding that plaintiff cannot recover outside of the contract, because it was "intended to cover all matters connected with the work contracted for. The matters of changes and extra work were expressly provided for. The provisions make the filing of a claim in writing within specified times a condition precedent to the contractor's right to receive additional compensation; nor was it waived. The evidence supporting these findings need not be reviewed; it will suffice to say that it was amply sufficient."

Such a holding is clearly erroneous because regardless of the magnitude and cost of work done under oral requests, directions and requirements of defendant by plaintiff, even though it was not within the scope of the contract, and not reasonably within the contemplation of the parties when they made it, plaintiff may not recover therefor, except by compliance with the literal terms of said contract.

12. In failing to hold that the very giving of oral directions by defendant for the performance of work not within the scope of the contract as originally contemplated by the parties, and standing by and seeing it performed by plaintiff, at great cost and expense amounting to 50% of the contract price, and causing the time to overrun by 50% of the stipulated time for completion of the work, constituted a waiver of the provisions of Ex. A, pp. 21-22; D (1) and (2); and that having received and retained the benefits, defendant is estopped to set up said provisions as a bar or defense to this action.

13. In failing to hold that the Special Provisions govern the general provisions; and the specifications govern the plans; and that restrictive language prevails over the general; and in failing to apply said principles to the problems arising out of the fifteen (15) claims involved in accordance with the universal rule of local and general law, and in accordance with the provisions of Exhibit A, p. 40 (next to last paragraph), so that plaintiff was entitled to recover under a proper construction and application of said contract.

14. In construing Ex. A, pp. 21-22, par. D (1) and (2) as conditions precedent and enforcing them if they were, because (a) equity will not enforce them because they are penalties; (b) they form no part of an agreed exchange, and performance will be excused; (c) a limit must be placed on this "method of leading a contractor astray, they are cut-throat provisions to entrap the unwary contractor, and shabby defenses; (d) they result in extreme forfeiture, injustice, hardship and oppression and amount to an unconscionable advantage over plaintiff, and cause defendant to be unjustly enriched at the expense of plaintiff, and the courts are unable to restore the status quo; (e) they should be strictly construed against defendant as it is the author of them; (f) they are executory collateral agreements, without consideration, and the obligation to pay embodied in the main executed contract accrues upon the performance of extra or additional work and its acceptance and enjoyment by defendant.

15. In failing to hold that Exhibits F and G constituted "written orders" within the meaning and in compliance with said provisions, Ex. A, pp. 21-22 D (1) and (2).

16. In failing to find and hold that defendant never requested plaintiff to file with the Engineer an itemized statement of, and vouchers for, the quantities and prices of such work, materials, or damages, as provided by paragraph (2) D, Ex. A, p. 22, so that the only condition precedent mentioned in said provisions never became operative and cannot be effective to defeat recovery for such work, matrials, or damages, under the terms of the contract, and defendant waived said provisions by concededly having made no such request; and is estopped to assert said provision to defeat this action.

17. In failing to hold that such provisions (Ex. A, pp. 21-22, D (1) and (2) only apply to extra work of proportionately small amounts, e. g. Exhibits 4, 5, 6 and 7, amounting to less than $450, made necessary for the construction

of the contemplated sewer, and do not apply to work vitally different in character and cost, as here, which was not within the reasonable contemplation of both parties when they made the contract and upon which the minds of the parties never met.

18. In holding that furnishing written orders by defendant for four small alterations or changes, totalling less than $450 is conclusive or even material to show lack of waiver, a new or modified contract, or estoppel, especially when it is undisputed that every bit of work done and materials furnished was ordered and directed by defendant, and it stood by and watched and inspected every bit of it, knowing it had given no written orders, and knowing it was not included in the original contract, and received and retains the benefits of same, and knowing that work of such character and cost could not be reasonably interpreted to be included in the contract price, expected, or at least, ought to have expected that it would have to pay the reasonable value thereof, whether any specific bargain was or was not made concerning it.

19. In failing to find or hold that plaintiff relied upon and reasonably understood that defendant's Engineer in Charge, Willard S. Brewer, promised plaintiff that if any extra work was done in compliance with its oral instructions and directions, on the entire job, defendant would pay for same upon final completion of the entire work; and even if no such oral promise was actually made, but plaintiff honestly believed it was, and rendered services and furnished materials which were, in fact, extras, on the strength of such belief, plaintiff should recover their reasonable value.

20. In failing to find or hold that plaintiff complied with said provisions by notifying respondent, within 20 days, after all extra work was completed that it had a claim of upwards of $50,000 against defendant, and as defendant showed no prejudice resulted, it is estopped to plead such a technicality as a bar to this action.

21. In holding or finding that plaintiff should not recover because it failed to mention extraordinary forced delays in two letters (Exs. U & V) requesting extensions of time to complete the work, because such omission establish all its claims as doubtful, its evidence incredulous, although its books kept in the regular course of business are in evidence, and without dispute, show that it cost plantiff, including a reasonable profit of $40,000, the sum of $199,908.12 to perform the work, and although the trial court found that, exclusive of depreciation on its equipment and of any profits plaintiff's out of pocket expenditures were more than $20,000 in excess of the payments it had received; and said court further found that it took nine months to complete a six months contract, when defendant neither pleaded nor claimed dissatisfaction with the plaintiff's work, nor of its rate of progress, and other specified things under Exhibit A, p. 27, par. M1.

22. In failing to find that defendant knew in its entirety what work plaintiff had done, and was not prejudiced by any failure to mention the causes of delay in said two letters for extensions of time, and expressly promised consideration of same when the work was finally completed, without making any complaints as to the rate of progress or the performance of the work, and knowing the nature and extent of the work plaintiff was performing and the delays and expense resulting therefrom, it knew or must have known that plaintiff was doing work wholly extra, not within the scope of the contract, and plaintiff should recover for such extras, together with a refund for all the liquidated damages defendant retained, and as to which latter, defendant did not file any counterclaim as required by Rule 13 (a) of Federal Rules of Civil Procedure.

23. In holding that although the specifications do not describe preformed cradle construction and say nothing about allowing time for the cradle to harden, the blue print plan Ex. C, shows this type of construction as Type C and

the specifications provide that the plans and specifications are intended to be cooperative and that all works necessary to the completion of the contract shown on the plans are to be considered as properly described in the specifications. The District Judge was of opinion and we agree, that Ex. C makes it sufficiently clear that the cradle of Type C construction would have to be preformed. The Engineer so interpreted the specifications and plans and the contractor made no objection at the time the work was performed that it was an extra or would delay completion of the contract.

24. In holding that petitioner was on notice that its contract was but part of a larger project and Exhibit B itself showed that the point markes as the "Beginning of Contract No. 18" and was the "End of Contract No. 16." There was no justification for assuming that the dotted lines indicated an existing sewer. Moreover, several weeks before Mr. Ciraci signed the contract on behalf of the plaintiff he knew there was no outlet at Farmington Avenue. The claim is untenable."

25. In holding that Claim No. 3 involves only work covered by the contract.

26. In holding that the delays upon which Claim No. 15 are based were not due to any deviations by defendant from the terms of the contract; that the contract was correctly construed and the evidence supports the finding.

27. In holding that the remaining claims involve relatively small amounts when they involve about $8000, and most of them are based upon provisions in the contract that specifically make them extras under the terms thereof.

28. In failing to hold that plaintiff should recover because it was confronted with unforeseen difficulties and unanticipated circumstances, not within the contemplation of the parties when the contract was made, which rendered its performance impossible from a commercial standpoint, unduly onerous, and it is inequitable to throw the loss on

plaintiff because they resulted in deviations from said contract, plans and specifications upon the basis of which the parties contracted, to a substantial extent, rendering its demand for extra pay manifestly fair and rebuts all inferences that it is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of defendant to coerce it to pay further compensation.

29. In failing to hold that the purpose of defendant in submitting documents to bidders and in making representations thereby was to supply information to bidders upon the job, who were expected to act upon it and entitled to act upon it in making their bids, and to secure bids upon the basis of the work represented to be required, and to apprize them reasonably as to the character quality, quantity, methods of construction, and cost of the work; such representations here are based upon actual investigation of subsoil and subsurface conditions and structures by competent engineers and technicians of defendant, and were adopted as its own, and carried with them the assertion of superior knowledge and information, and are authoritative; and plaintiff was entitled to rely upon them and did rely upon them, and as the time was too short, and defendant did not expect plaintiff to make an independent personal investigation, but expected it to act upon the documents submitted to bidders, and plaintiff was induced thereby to make its bid and enter the contract. Defendant is responsible for the consequences of plaintiff's reliance upon its representations, and as they were misleading, and misstatements of actual conditions encountered in the trench and the work turned out to be vitally different in character and cost from that so represented, defendant should pay plaintiff for its loss, expense or additional cost, plus a resonable profit, under the contract, or outside of the contract, and this is so even though such misrepresentations were made innocently and in good faith, and defendant truthfully set forth all the information it actually had or knew.

30. In failing to hold that such misrepresentations need not amount to fraud, but give rise to a cause of action in the nature of a breach of warranty, and of the sufficiency of the plans for the purposes intended, or recovery may be had for plaintiff on the ground of mistake, new and different work, out of the scope of the contract, breach of contract, breach of an implied warranty, misrepresentation, restitution in damages; reformation by damages, estoppel, unjust enrichment, quantum meruit, quasi-contract, implied contract, fraud, actual or constructive, concealment, nondisclosure, bad faith, and other grounds claimed at the trial, so that plaintiff is entitled to recover the reasonable cost of the work, plus a reasonable profit, under the contract, or outside of the contract.

31. In failing to find and hold that to give effect to such exculpatory clauses in inequitable and against public policy, because defendant cannot legally exonerate itself from fraud, misrepresentation or concealments and nondisclosures by the inclusion of them in the contract.

32. In refusing to hold that plaintiff ought at least to be made whole for its losses, expenditures and a reasonable profit thereon; in refusing to find and hold that prima facie they are reasonable; and it will not be presumed that losses and expenditures incurred in a fair endeavor to do the work ordered and requested by defendant were foolishly or unreasonably incurred, but it is incumbent on defendant to prove that they were foolishly or unreasonably incurred; and in failing and refusing to assess damages because of the difficulty of making such assessment, and plaintiff having laid the foundation for their assessment, it was clearly error to refuse to award damages for any or all of these claims.

33. In failing to find and hold that the Engineer did not act in good faith and did not exercise an honest judgment throughout the performance of his duties as engineer in respect to these claims.

34. For brevity, each and every one of the Assignments of Errors contained in the Printed Record, pp. 76-124 are hereby respectively reassigned and made a part hereof as fully as if set forth herein.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

This case presents questions of the first importance relating to the construction and interpretation of Municipal and Private Building Contracts containing all the usual exculpatory clauses *except* one against "unforeseen difficulty" and "unanticipated circumstances"; and whether or not recovery must be denied to a contractor because of the existence of such a contract, when some or all of the exculpatory provisions have not been complied with, and especially, when all or part of the usual clause relating to Changes and Extra Work have not been complied with, thus impelling the Courts to declare a forfeiture of extra work and material furnished although they were orally ordered and directed to be done by a contractor and the contractee stood by day by day and saw his oral orders and directions being fulfilled by the contractor, and work and material of substantial magnitude rendered and furnished thereunder knowing it had not given "written orders" for same as required by the contract, and knowing it did not expect to pay contractor for same when the contract was fully performed; and the usual clause making the "Engineer to be the Judge" so that as interpreted, this clause not only makes him the judge of the facts *but of the law of the contract and its construction,* and no recovery allowed unless he *concedes* that the facts and the law of the contract, as construed by him, warrants a recovery; and, finally whether or not recovery "outside the contract" on the basis of waiver, estoppel, unjust enrichment, quasi-contract, breach of contract, warranty of the plans, express or implied, or in the nature of a breach of warranty; unforeseen difficulty or unantici-

pated circumstances not within the resonable contemplation of the parties when they made the contract, new or additional work, and quantum meruit, innocent misrepresentations, on an implied contract, in law or in fact, mistake, uni-lateral or mutual, and other usual equitable and legal remedies applied to afford relief to contractors, may be had.

An early authoritative decision of these questions by this Honorable Court is of great importance, not only to the parties, but to Public and Private Building and Construction contractors and to owners requiring their services; and the issue of a Writ of Certiorari appears in order.

There is no jurisdictional question involved, as petitioner is a corporation, existing under the laws of Ohio, and the respondent is a municipal corporation, existing under the laws of Connecticut; the action involves $68,632, exclusive of interest and costs, and procedural requirements have been complied with, so that the decision sought to be reviewed is based squarely on the *merits of the isues presented.*

Aside from the importance of the issues presented, the decision should be reviewed for the additional reason, we submit, that it is clearly erroneous and not in accord with the principles of applicable *local laws* and *decisions of the Supreme Court of Errors of the State of Connecticut,* where the contract was made and performed and which were impliedly made a part of the contract as if they were set out at length therein.

It is also clearly erroneous and not in accord with the principles and applicable decisions of this Honorable Court.

It probably conflicts with the applicable decisions of other United States Circuit Court of Appeals.

It probably conflicts with the principles and applicable decisions of the highest Courts of other States constituting the weight of authority, or the better reasoned cases.

It is not in accord with the decisions of the highest Court of the State of Connecticut in the following cases:

Alford v. Belden, 4 Conn., 461, 464. (1823)

Connelly v. Devoe, 37 Conn., 570 (1872)

Tryon v. Corbin, 62 Conn., 161.

Scholfield Etc. Co., v. Scholfield, 71 Conn., 1-19.

Water Comrs. v. Robbins, 82 Conn., 623-644.

Mahoney v. Hartford Invest. Co., 82 Conn., 280.

Casey v. MacFarlane, 83 Conn., 442-443.

Tompkins v. Bridgeport, 100 Conn., 147, 152.

Clover Mfg. Co., v. Austin, 101 Conn., 212, 214.

Brett v. Cooney, 75 Conn., 338.

Tompkins v. Bridgeport, 94 Conn., 659, 680.

Hills v. Farmington, 70 Conn., 450.

Fagerholm v. Neilson, 93 Conn., 388.

Oloughlin v. Poli, 82 Conn., 427, 435.

Politziner Bros. v. Vanetch, 101 Conn., 265.

Fischer v. Kennedy, 106 Conn., 484, 492-7.

Geremia v. Boyarsky, 107 Conn., 391.

Blakeslee v. Water Comrs., 106 Conn., 642ff.

Blakeslee v. Water Comrs., 121 Conn., 163.

E. & F. Constr. Co., v. Stamford, 114 Conn., 250, 254.

Ball v. Pardy Constr. Co., 108 Conn., 549.

Doeltz v. Longshore, Inc., 126 Conn., 597.

Dean v. Hershowitz, 119 Conn., 398, 412.

Wray v. Fairfield Amusement Co., 126 Conn., 227.

Elbertson Cotton Mills, v. Ind. Ins. Co., 108 Conn., 710.

and other cases contained in petitioner's Brief.

It is clearly not in accord with the following decisions of this Honorable Court, as shown by the following cases:

Henderson Bridge Co., v. McGrath, 134 U. S. 260.

Hollerbach v. United States, 233 U. S. 165.

Christie v. United States, 237 U. S. 234.

United States v. Stage Co., 199 U. S. 414, 424.

United States v. Spearin, 248 U. S. 132.

Freund v. United States, 260 U. S. 60.

Binney v. Chesapeake Etc. Co., 33 U. S. 201.

Bogardus v. Comr., 302 U. S. 34.

United States v. Smith, 256 U. S. 1.

United States v. Cook, 257 U. S. 523.

United States v. Behan, 110 U. S. 338, 344.

and others appearing in the Brief.

It probably conflicts with applicable decisions of different United States Circuit Court of Appeals and with other decisions of the Second Circuit.

Montrose Constr. Co., v. Westchester, 80 F. 2d 841 (2d. Cir.).

Salt Lake City v. Smith, 104 F. 457.

United Constr. Co., v. Haverhill, (2d Cir.), 9 F. 2d, 538.

Pitt. Constr. Co. v. Alliance, (6th. Cir.), 12 F. 2d, 28.

Bankers Trust Co., v. Hale & Kilburn Corp., (2d Cir.), 84 F. 2d, 401.

Drainage Dist. v. Rude, 21 F. 2d, 261.

Luntz v. Wheeler, 113 F. 2d, 767.

Rosen v. Furnbilt Stores Inc., 103 F. 2d, 294.

United States v. So. Gaby Co., 107 F. 2d, 3.

Cowen Co. v. Hanck Mfg. Co., 249 F. 285.

Bush v. Jones, 144 F. 942.

New York v. Pa. Steel Co., 206 F. 455.

Sartoris v. Utah Constr. Co., (9th Cir) 21 F. 2d, 1. Certiorari denied, 278 U. S. 651.

Dock Contracting Co., v. New York, 296 F. (2d Cir) 377.

Kilby Mfg. Co., v. Hinchman etc. Co., 66 C. C. A. 67.

The Sappho, 94 F. 543.

Caldwell v. Schmulback, 175 F. 179.

United Steel Co. v. Casey, 262 F. 889.

and other cases cited in our Brief.

It is probably in conflict with the weight of authority, the better reasoned cases, and modern applicable decisions.

Annotation, 76 A. L. R. 268 et seq., and cases cited.

Annotation, 66 A. L. R. 650, et seq., and cases cited.

Annotation, 137 A. L. R. 530, et seq., and cases cited.

and cases cited in the Brief.

In the interest of brevity (Rule 38, par. 2, Furniss, Withy & Co. Ltd. v. Yang-sze Asso. Ltd., 242 U. S. 430) plaintiff does not herein set forth all the points which will be urged at the argument on the merits should the writ be granted nor all the contentions in support of such points; but, in order to comply with the Rule of this Court requiring that all issues upon which decision is requested be presented in the Petition for Certiorari (Gunning v. Cooley, 281 U. S. 90, 98) plaintiff here refers to and incorporates into this petition all the matters presented in its Assignments of

Errors (R. pp. 76-124) on the appeal to the United States Circuit Court of Appeals for the Second Circuit, with the same force and effect as if herein set out in full.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be granted and it herewith files on Original Transcript of the Printed Record, duly certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit, and 9 copies of same as printed below, together with the proceedings had in the said Circuit Court; forty (40) printed copies of this Petition, and the supporting brief annexed to the Petition; the Original Exhibits and Three Transcripts of the Evidence designated on Appeal, which were made a part of the Record as aforesaid; and prays that the judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Court; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Hartford, Connecticut, this the 24th day of May, 1943.

GEORGE H. COHEN,

A member of the bar of the United States Supreme Court, and

UFA E. GUTHRIE. Counsel for Petitioner.

36 Pearl Street, Hartford, Connecticut.

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BRIEF IN SUPPORT OF PETITION.

I.

Opinions of the Courts Below.

The opinion of the District Court, its Findings and Conclusions of Law are set forth in the Printed Record, pp. 25-46, and partially in 2 F. R. D. 117; and that of the Second Circuit in 133 F. 2d, 468-470; both are incorporated herein for brevity. Certain parts are quoted in the Argument.

II.

Jurisdiction.

Jurisdiction of this action exists because the parties are citizens of different states, and the matter in controversy involves $68,632, exclusive of interest and costs.

III.

Statement of the Case.

This has already been stated in the Petition, which is hereby adopted and made part hereof, with such additional statements as are contained herein.

IV.

Specifications of Errors.

These have also been stated in the petition and are hereby adopted and made a part hereof.

V.

Argument.

Introduction.

We apologize in advance for the length of this brief, and that of the Petition, but the number of the claims, most of which have to be treated individually, and the number and

complexity of the questions of law involved, we submit, make an intelligent presentation of the Petition difficult, and some length is unavoidable.

It is submitted that the importance of the questions involved is of general public interest, and especially so because the applicable decisions of this Honorable Court; of the Supreme Court of Errors of the State of Connecticut; of the Second and other United States Circuit Court of Appeals; and of the clear weight of authority of other States, which have construed similar contracts, have apparently reached a contrary result.

The decision in this case invokes and establishes rules of law that never obtained in Connecticut, and, in this modern age, establishes rules of law long outmoded, because unfair and inequitable; and above all, that have long been disfavored, generally, by this Honorable Court and by other Courts, constituting the weight of authority or the better reasoned cases.

In particular, Connecticut Courts never construed such contracts so as to establish a doctrine which may be described as the rule of "tooth and claw"; nor so as to *lead a contractor astray;* nor to enforce so-called *cut-throat bargains,* as such provisions are called by some Courts, (66 A. L. R. 651).

The history of the evolution of the law of contracts of this kind, with their exculpatory clauses, seeking to throw all risk of loss on the contractor, shows they have not been strictly enforced, as they were in this case. *Courts have been guided, rather, by equitable and practical considerations such as: (1) What did the contractor agree to do, i. e. what did the parties contemplate was to be done under the contract; and (2) Has the contractor done more than the parties contemplated when they made the contract, and if so, what was it reasonably worth?*

With such equitable and practical considerations influencing the Courts, the body of the law as it now stands, is just and equitable to both parties.

It is for these basic reasons that this Petition is presented, and because a law of contract has been established which is contrary to the weight of authority in all Courts, or the better reasoned cases, and allows and enforces the use of contractual devices which have long been unfair and unjust in their consequences, because the contractee in every case derives the benfit of additional work.

It is extremely important, we submit, that the decision here be reviewed because it establishes an unjust law where more equitable and practical considerations have been applied and enforced, and it is a subject of general importance to contractors, owners and the general public, at a time when a large amount of work, controlled by such provisions is being done and in prospect.

It is respectfully submitted that the construction of such a contract is so well settled that little argument is needed to show the decision here is clearly wrong, and that this Petition should be granted and the case fully argued on the merits.

ARGUMENT.

The Court was clearly in error in failing and refusing to following the "local law" and applicable decisions of The Supreme Court of Errors of the State of Connecticut whose decisions are controlling.

Erie R. Co., v. Tompkins, 304 *U. S.* 64.
Ruhlin v. New York Life Ins. Co., 304 *U. S.* 202, and 262.

In the *Ruhlin* case, this Honorable Court says:

"... The parties and the Federal Courts must now search for and apply the entire body of the substantive law governing an identical action in the State Courts ..."

And in the *Tompkins* case:

". . . it is settled beyond question that it is the Pennsylvania law which the Federal Courts . . . are bound to apply . . .

"The Pennsylvania decisions should have been recognized as controlling because they had established the rule of law with sufficient definiteness and finality to constitute a local rule of property, action or contract, even though the question might otherwise have been regarded as mainly one of general law . . ."

Ever since 1823, The Supreme Court of Errors of Connecticut has allowed recovery outside of the contract, although there was a written agreement governing what the parties contemplated when the agreement was made, when work and materials made necessary by unforeseen difficulties or unanticipated circumstances not covered by the contract make it inequitable, inconvenient, unduly onerous or impractical from a commercial standpoint to complete the contract work.

Alvord v. Belden, 4 *Conn.*, 461-465, (1823).
Connelly v. Devoe, 37 *Conn.*, 570.
Tryon v. White, 62 *Conn.*, 161.
Casey v. MacFarlane, 83 *Conn.*, 442, 443.
Mahoney v. Hartford Invest. Corp., 82 *Conn.*, 280.
Water Comrs. v. Robbins, 82 *Conn.*, 623.
E. & F. Construction Co. v. Stamford, 114 *Conn.* 250.
Blakeslee v. Water Comrs., 106 *Conn.*, 642.
Blakeslee v. Water Comrs., 121 *Conn.*, 161.

In *Alvord v. Belden, supra,* plaintiff agreed to repair defendant's vessel—*to take her down to below her wales,* put in top timbers, wales and waist, take off and replace her decks, replace all defective timbers and raise her to a two-decker for which defendant agreed to give him one-third of the brig. During repairs it was discovered that timbers below the wales were entirely defective; whereupon, plaintiff under the authority and by request of defendant, made repairs upon the bottom below the wales. It was held: the

repairs so made below the wales were not included in the written agreement and recovery was allowed for reasonable compensation in addition to the contract price. The Court says: (p. 464).

"The sole controversy . . . depends on the solution of the question, whether, by the written contract . . . plaintiff contracted to repair the bottom of the brig below her wales . .

"It appears from the written contract . . . plaintiff agreed *to . . . take her down to below her wales.* This leading expression . . . imports . . . plaintiff was to reduce the vessel down to her wales and *immediately* below them. If the contract be construed to extend beyond this limit, it must be considered as including the entire bottom of the brig, even to the extremity of her keel; for which no one can seriously contend . . . . By the defendant, it is insisted, that the expression is entirely indefinite, and obliged the plaintiff to replace defective timbers in every part of the vessel; but this construction is too extravagant, for a moment to be admitted. The error of the defendant consists, in giving an exposition to the phrase in question, without regard to the other parts of the contract. But the construction must be made on the whole agreement . . .

"The general object of the parties, was, to put on the brig an additional deck; and probably the contract would not have existed, if her bottom had been considered to be materially unsound. At least, it is a fair presumption, had it been anticipated that her bottom was in a defective condition, that the repair of it, would have constituted a prominent feature of the agreement. It could never have been the intention of the parties, to put on the brig a double deck, if a suitable foundation was deficient. But it is entirely probable, from the silence of the agreement, that the defects were latent and first discovered on taking the brig down below her wales."

In *Connelly v. Devoe, supra,* this rule was applied, where plaintiff, who agreed to dig a well for defendant, met with unexpected difficulties in the caving of the sides—the sand proving unusually bad for well-digging—which necessitated shoring and special equipment. He was unable to complete within the time limited, due to the above circumstances.

He was not only allowed recovery for additional compensation but was relieved from a liquidated damage provision of the contract.

In *Tryon v. White, supra,* after the contract was made, changes were made in locating a building which required deeper foundation and more materials than the plans showed. Plaintiff recovered *outside* of the contract because the work was in fact extra, and defendant had received and retained the benefits, although there was no clear contract to pay, it was the *understanding of plaintiff* that a promise to pay for the extras had been made, and defendant had seen the work being performed day by day.

In *Casey v. MacFarlane, supra,* the parties were in dispute as to whether the *furnishing and laying certain brick was included in the contract.* The contract had a "written order" provision for *alterations and changes which was not complied with.* Plaintiff recovered on an implied promise to pay, the court saying:

"When the parties deviate from the original plans agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated . . . it is undoubtedly to be regarded and treated as work wholly extra, out of the scope of the contract, and may be recovered for as such . . .

"The provision in the contract that "no alterations shall be made . . . except upon the written order of the architect is not applicable to plaintiff's claim.

"The materials and labor here sought to be recovered for were never contemplated in the original plans and specifications, and were not alterations within the provisions of the contract. (citing cases).

"It is fair to assume that both parties remembered the terms of the contract and knew its legal effect. When the defendant requested the plaintiffs to perform its work and furnish these materials, which were not included in the contract, the plaintiffs had a right to understand that the defendant consented to be liable therefor.

The decision is based on the principle that where work is performed under circumstances which raises a fair presumption that the party allowing its performance and receiving the benefits, expected, or ought to have expected, that they were to be paid for regardless of whether any specific bargain is or is not made concerning it.

In the *Mahoney* case, *supra*, recovery was allowed on such an implied contract, (citing Fitzgerald Constr. Co. v. Fitzgerald, 137 U. S. 98), despite "written order" provisions of the contract not complied with. In Henderson Bridge Co. v. McGrath, 134 *U. S.* 260, a leading case, recovery was had on an implied contract, where there was no express agreement to pay for work done outside of the contract. See also Goddard v. Foster, 17 Wall, 123.

The *basic error of both Courts*, in the case at bar, *was in restricting any recovery to compliance with, as a condition precedent, all of the terms of the written contract.* There are a great many reasons why such a construction of the contract is clearly erroneous, *as matters of law*, and *not as matters of fact, as the trial judge concluded* (R. pp. 26-30). *The Second Circuit seems also to have treated such matters as questions of fact, when they are in their very essence, questions of law. The rule is clear—the construction of the plans and specifications and the contract, is universally held to be a question of law. It is so held in Connecticut, where the contract was made and performed, and is reviewable as matters of law.*

Mazziota v. Bornstein, 104 *Conn.*, 430, 435.

It was clearly error, for said Court, on appeal, *to follow the findings of the trial judge. The findings are incomplete, as they omit many admissions, undisputed evidence, and inferences that should be drawn from the testimony of a disinterested expert, and include many findings that are inherently improbable, and contrary to common knowledge, practical engineering experience, and show that both courts failed to*

grasp the problems involved. But that aside, there are controlling considerations which must necessarily be inferred from the plans and specifications; the other written documents in evidence and the inferences to be drawn from them upon a proper construction, which as matters of *law,* impel the conclusion that the Courts clearly erred in their construction and interpretation of them and the judgment should be reversed.

The Court was clearly wrong in construing Exhibit A, pp. 21-22 par. D as a condition precedent, and in enforcing it if it were under the circumstances disclosed by the finding upon a proper construction of the provisions. At most, they constituted a collateral agreement or penalty and formed no part of the agreed exchange. Their enforcement leads to unjust and inequitable results, especially when the respondent has, and retains the benefits of work of great magnitude and expense, and there is no way for the Court to restore the status quo.

There are many ways to legally and equitably avoid the consequences of these provisions and many courts are loath to enforce them. They may be waived or a new or substituted agreement be made which will avoid such consequences. Estoppel is a remedy of most frequent application, perhaps, because in the very nature of things it is inequitable to allow a person to watch improvements being made from day to day, without stopping the work; or by giving verbal orders, knowing no written orders have been given, and *standing by and seeing work of great magnitude and cost being placed on his property, so that it is inequitable for him to escape payment and yet receive and retain the benefits.*

Annotation, 66 *A. L. R.* 650ff, and many cases discussed.
Mahoney v. Hartford Invest. Corp., 82 *Conn.,* 280.
Tryon v. White, 62 *Conn.,* 161 and cases cited.
Blakeslee v. Water Comrs., 121 *Conn.,* 163ff. (180).
Williston on Contracts, Secs. 676 (4); 807.

Sartoris v. Utah Constr. Co., 21 *F. 2d*, 1.
United States v. Barlow, 184 *U. S.* 123.

In *Mahoney v. Hartford Invest. Corp.*, 82 *Conn.*, 280, 287, the Court says:

"It is apparent that Mr. Garde had authority to make these orders for extra work. The directions by him, for the performance of this work not called for by the contract, are necessarily and of themselves a waiver of any requirement for written orders by the architects . . ." (Again, p. 286, it says): "Mahoney expended his money and furnished labor and materials for the benefit of the corporation. The corporation has accepted it, and it is under obligation to pay him as much as his labor and materials are fairly worth."

Both Courts erroneously held these and other cases cited on these questions *did not apply.* They necessarily *must* apply when respondent admitted, as to most of these claims, that it verbally ordered the work to be done that way, and other parts of the court's findings show unmistakably that it was present by its Engineer in Charge, its Chief Inspector, and other inspectors and admitted that it saw everything being done, and did not stop the work, but acquiesced in its performance. *It is then, a pure question of law and the courts clearly erred in the conclusions reached.*

Equity will not permit one to enrich himself at the expense of the other.

Fischer v. Kennedy, 106 *Conn.*, 484, 493.

A condition will be excused without other reasons if its enforcement (a) will involve extreme forfeiture or penalty; (b) its existence or occurrence forms no essential part of the exchange for performance.

Restatement of Contracts, Sec. 302 (a) and (b)

From a practical standpoint, neither party intended that these provisions would be a means of inflicting a wrong on the contractor if they were not complied with. They formed

no part of an agreed exchange when the contract was made, because both parties intended that if any extra work was done that the written orders would be given, or that some means would be taken to avoid inflicting a penalty on the contractor. A contractor would bid the same amount on the contract for the work represented, as he would if they were not in the contract. They were then collateral agreements for a penalty, and it is against public policy, equity and good conscience to enforce them. It would be highly unreasonable to construe this provision,—one of extreme forfeiture, in favor of respondent, the author of the language. No prejudice has been shown—on the other hand, as we shall see, it received great benefits, and should be compelled to pay for their reasonable worth!

Restatement of Contracts, Sec. 302, Comment a and Illustration 1.

McIsaac v. Hale, 104 *Conn.,* 374, 379.

In that case plaintiff agreed to make improvements on property leased to defendant, who *agreed to pay additional rent upon the submission of bills to defendant* and *when the parties should agree on the amount of costs.* Some of the bills were submitted, but not all, and no agreement ever reached as to the costs of such improvements. Defendant claimed that the submission of bills and an agreement upon the amount were *conditions precedent.* The court held they were not, saying:

" . . . If the provision for submission and agreement on the bills was a condition precedent, then it was intended that the defendant should enjoy the improvements without compensation to the plaintiff unless the condition was met. We cannot so construe the lease, and we hold the second undertaking to be a distinct and independent one. The main contract, by which the plaintiff furnished the improvements, and for which the defendant agreed to pay additional rental, was an executed contract. The second provision was executory, and its obligation was contingent upon the making of

these improvements and accrued thereupon. It furnished a method of computing the sum which the defendant became obligated to pay as increased rental after the additional improvements had been made."

The applicable decisions of Connecticut relative to construing conditions precedent so as to avoid injustice, inconvenience, undue hardship, oppression and unconscionable advantage are based upon the principle that *such conditions result in consequences not actually intended by parties,* have their foundation in Eldred v. Hawes, 4 Conn., 465, 469 (1823) where the court says:

"In support of the rigid construction, rendering the demand a condition precedent, there are the *words* of the contract only; but that a presentment and demand were not understood to be an essential part of the contract, the *subject matter,* and the *effects* and *consequences,* make it abundantly manifest.

"It can scarcely be believed, that a creditor should agree with his debtor, or that the latter should request an agreement, *if through accident or negligence, the demand were not strictly made . . . that an honest debt should be forever lost;* and yet on this foundation rests the defendant's position . . .

"It requires no authority to show, that every contract, . . . should receive a construction, in avoidance of injustice and inconvenience. What can be more unjust, than to require . . . a rigid punctuality of demand, on pain of forfeiture of a debt? . . ."

Building contracts are widely distinguished from a general right of recovery by reason of the inequity of permitting a great loss, to the unjust enrichment of the owner, because of no opportunity for courts to restore the *status quo.*

Williston on Contracts, (1924 Ed), Secs. 676 (4); 807.

Plaintiff complied with the condition, and the Court was clearly wrong in holding otherwise, and in putting an over-

literal construction thereon, going far beyond its language; and in failing to construe the entire contract more strictly against defendant, the author of the language.

Horgan v. Mayor, 55 *N. E.* 204.
Drainage Dist. v. Rude, 21 *F.* 2d, 261.
Elberton Cotton Mills v. Ind. Ins. Co., 108 *Conn.,* 707, 710.

A careful reading of Exhibit A, pp. 21-22, par. D (1 and 2) shows that the filing of an itemized statement together with vouchers for the quantities and prices of such work, etc. was agreed to be a condition precedent *only when requested* by defendant, and it is limited to the right to "receive additional compensation *under this contract.*" Defendant *conceded* it made no such request. (p. 748). No prejudice was or could be shown, because defendant admittedly, was present by its inspectors every day and saw all the work and materials as they went into the job.

In *Elberton Cotton Mills v. Ind. Ins. Co., supra,* a fire insurance policy provided that an itemized proof of loss, if not filed in 90 day of loss by fire, would result in a forfeiture of claim. The court reviews the authorities, and holds *that no forfeiture resulted from non-compliance with this provision,* and points out the disfavor with which such clauses are construed by courts; and the rule that such clauses of "doubtful meaning" should be construed most favorably to insured, as strict enforcement would be a "pitfall or snare to the unwary," for which purpose they are not intended. It distinguishes between the *initial notice affording an opportunity for prompt investigation, and the detailed proof;* the former being of the essence of the contract, the latter not. It also held that defendant had not been prejudiced, and no equitable reason existed to declare a forfeiture.

Our *initial notice* was sent February 5th, 1938, *before the work claimed for was completed.* No *award* had been made. *There existed no reason for prompt investigation of defend-*

ant, because it ordered the work, and knew every item of labor and material that went into this extra or new and different work. To enforce a forfeiture here would be shocking to a court of equity, when no objections were made by defendant when the work was being done, but it acquiesced in its performance. Defendant cannot equitably say that it is not liable to pay what such work was reasonably worth.

Blakeslee v. Water Comrs., 121 *Conn.*, 163, 180.
Tryon v. White, 62 *Conn.*, 161, and cases cited.
Sartoris v. Utah Constr. Co., 21 *F.* 2d. 1

In the *Sartoris* case, *supra*, the court say in substance:

Could the railroad company reasonably conclude that plaintiff, who was under no obligation to proceed would gratuituously proceed at a loss of $200 per day or $6000 per month, or an aggregate of more than $70,000 on a $140,-000 job? It would have been better if plaintiff had declined to proceed without a definite agreement in writing, but *his want of caution does not amount to a waiver or deprive him of a valuable right. Looking backward we may see want of caution or forcsight in most business transactions that result in litigation. The railroad company was under an obligation to make its position clear. It did not stop the work. It should have known that the radical changes required additional cost which all must have at once realized would be great. Defendant was held liable.*

See also: Annotation, 66 A. L. R. 650ff.

The Court, on appeal, was clearly in error in saying:

" . . . No claim in writing was made when the work was being done. The contractor cannot fairly contend that the work constitutes extras under the contract without complying with the contract provisions . . ."

In argument below, counsel for defendant states:

" . . . The appellant cannot fairly contend that these claims would not constitute extras under the contract and

the contract provisions covering them should have been complied with by it . . ."

This statement of counsel and the court embraced Claims 1, 2 and 3, totalling $42, 807.84. *It would apply equally to Claims 4, 6, 9, 11, 12, 13, 14, and 15, aggregating about $62,000, or 90% of all claims, as they arise out of the construction of the contract as applied to unforeseen difficulties and unanticipated circumstances encountered for the first time in opening the trench, or from directions by defendant to perform work not called for in the plans or specifications, and upon which the minds of the parties never met.*

Even if the conditions had not been complied with, ways exist, as matters of law, to dispose of them favorably to plaintiff:

1. They do not apply to recovery on the basis of quantum meruit.

2. They were waived, by the giving of oral authority and requests to do work which was in fact extras, either under or outside of the contract; or defendant is estopped to assert them under the circumstances found and discussed.

> *Mahoney v. Hartford Inves. Corp,.* 82 *Conn.,* 280, 287.
> *Salt Lake City v. Smith,* 104 *F.* 457. (8th Cir.).
> 66 A. L. R. 650ff, (Annotation) and cases cited.
> 51 *Yale Law Journal,* 162ff and cases cited.
> *Blakeslee v. Water Comrs.,* 121 *Conn.,* 163, 180.
> *Casey v. MacFarlane,* 83 *Conn.,* 442, 444.

3. Even if there were no express oral promise to pay for such work there is a duty *which the law imposes for reasons of justice to make fair compensation for what has been properly and actually received by defendant which it has accepted and made use of for its own increase and advantage.*

> *Tryon v. White,* 62 *Conn.,* 161.
> *McCaffery v. Groton Etc. Ry. Co.,* 85 *Conn.,* 584.

The Court clearly erred in holding that "merely because the contract proved unprofitable to the plaintiff the contract provisions may not be disregarded."

Plaintiff made no such claim, so the Court must have misunderstood the theory of recovery. It did claim that constructing the sewer, as required by defendant, and in view of the unforeseen difficulties it encountered, which were not shown on the documents submitted to it, as the admitted basis for making its bid, *the cost of the work it actually had to perform was so vitally different in character and cost that it would be inequitable to throw the loss upon plaintiff, relying upon cases cited above, and what seems to be the weight of modern authority in both state and federal courts.* Though the bases of recovery may be different, the result is uniform and recovery allowed despite such contract provisions if such a loss is substantial, vital, radical or material.

Salt Lake City v. Smith, 104 *F.* 457. (8th. Cir.).
Freund v. United States, 260 *U. S.* 60.
United States v. Atl. Dredging Co., 253 *U. S.* 1.
United State v. Stage Co., 199 *U. S.* 414.
Montrose Contracting Co. v. Westchester, 80 *F.* 2d. 841. (2d. Cir.).
Blakeslee v. Water Comrs., 106 *Conn.*, 642, 655.
51 *Yale Law Journal*, 163, 165, and cases cited.
6 *Williston, Contracts* (1938) Sec. 1931.

The Court was clearly wrong in refusing to allow recovery under the doctrine known as unforeseen difficulties or unanticipated circumstances, even though under the contract there are various exculpatory clauses seeking to throw all loss on plaintiff, and in construing said clauses strictly against plaintiff in their literal sense, without giving any effect to limiting or restrictive clauses, or to special provisions, which they specified were to govern; and especially so, when the contract did not have a clause exonerating defendant from unforeseen difficulties.

E. & F. Constr. Co. v. Stamford, 114 *Conn.* 250.

Salt Lake City v. Smith, 104 *F.* 457.
Montrose Contr. Co. v. Westchester, 80 *F.* 2d. 841.
United Constr. Co. v. Haverhill, 9 *F.* 2d. 538.
Hollerbach v. United States, 233 *U. S.* 165.
United States v. Smith, 256 *U. S.* 11.
51 *Yale Law Journal*, 163 and cases cited.
76 A. L. R. 268, Annotation, and cases cited.
Williston, Contracts, Vol. 6, Sec. 1931 (1938).

Courts have refused to enforce such clauses where the burden of risk become unduly severe because of circumstances under which most municipal contracts are executed, and consequences a rigid enforcement produces. Strict enforcement might lead to collective increases in all bids causing excessive prices where such difficulties fail to develop.

Christie v. United States, 237 *U. S.* 234.

A contractor unable to suffer a large loss would be forced to repudiate, stopping work on important public projects. Either result is a crude adjustment of risks which can be more equitably allocated after the extent of the contingency is known. And a basic reason for permitting recovery is that in every case the owner, and not the contractor derives the benefit of additional work.

Recovery is usually allowed *if the contractor was reasonable in relying upon the representations,* and *the deviation from the plans and specifications sufficiently justify added compensation.*

51 *Yale Law Journal*, 163 and cases cited.
76 A. L. R. 268, Annotation, and cases cited.
See cases cited herein.

In *E. & F. Constr. Co. v. Stamford*, 114 *Conn.*, 250, the rule in *Connecticut* is stated:

" . . . The purpose of these representations is to supply information to bidders upon the job who were expected to act upon it, and entitled to act upon it, in making their

bids. They purported to be based upon actual investigation of the subsurface by competent engineers, were adopted by defendant as its own, and carried with them the assertion of superior knowledge and information. They were authoritative and misleading. The plaintiff was . . . induced by them to enter into the contract. The defendant is responsible for the consequences of the plaintiff's reliance upon its misstatements regardless of whether they were made in good faith . . ."

The ground of recovery in Connecticut, as laid down in that case, is in the nature of a breach of warranty.

This Honorable Court has based recovery on the ground they are to be taken true and binding on the defendant.

The basis of recovery in Salt Lake City v. Smith, 104 F. 457, is quantum meruit, in that it is new and different work, not governed by the contract terms.

Most Courts have followed the reasoning in cases decided by this Honorable Court in allowing recovery, though on, perhaps, different theories, as laid down in *Hollerbach v. United States supra; United States v. Spearin, supra, Christie v. United States, supra,* and numerous other cases cited in the above references.

The contract here did not have a clause exonerating defendant from unforeseen difficulties. It was conceded by defendant that it did not expect a bidder to check up all the underground conditions and structures in the two weeks intervening between the advertising and opening of bids, but only to look over surface objects; that errors and mistakes in the information given to bidders, would put him at a disadvantage; it expected a bidder to make such information the basis of figuring his bid, and that the investigation it made was conducted by expert engineers and technicians under its supervision and direction. (p. 927-930;

The District Court laid great stress on a personal examination by plaintiff in going over the site of the work before making its bid (R. pp. 36-37) saying:

"And the blue prints bear the warning that the contractor must satisfy itself as to the existing structures, as the plot was not warranted to be "even approximately correct". Ciraci testified that he personally examined the terrain before he made his bid. There seems no excuse for a misunderstanding here."

It applied that principle, so decided, to all claims relative to all underground conditions and subsurface structures, involving about 90% in value of plaintiff's claims, or about $62,000.

The Circuit Court erroneously agreed with its construction and its decision is reversible as a matter of law.

The Court clearly erred in holding plaintiff assumed the risk of encountering these underground structures and conditions, whether shown on the plans or not.

This is *contrary* to the *rule in Connecticut,* and *in this* Court.

Tompkins v. Bridgeport, 100 *Conn.,* 147, 152.
United States v. Stage Co., 199 *U. S.* 414.
Hollerbach v. United States, 233 *U. S.* 165.
Christie v. United States, 237 *U. S.* 234, and others.

In the *Tompkins* case, *supra,* such structures were *erroneously located on the plans, delaying the work and causing added expense.* The Court says:

"It is not alleged that these misrepresentations were intentionally made, but being authoritative and misleading, it is not necessary to allege that they were intentionally false . . . For the delay and extra expense of dealing with such sewers, plaintiff might have recovered under the contract notwithstanding its general provision that the price bid shall also cover the care of existing service pipes and structures of all kinds affected by the work whether shown on the plans or not." (Citing the three cases decided by this Court, next above.)

It is to be noted that the *notations* above referred to in the blue prints stated *defendant supposed they were approx-*

imately correct. In *Mahoney v. Hartford Invest. Corp.*, 82 *Conn.*, 280, a *similar supposition* was made, and *plaintiff recovered for replacing an old condemned sewer with a new one;* and in *United States v. Atlantic Dredging Co.*, 258 U. S. 11, *a belief was expressed* by the Government as to the accuracy of the plans, and *recovery allowed, although it was expressly stated that there was no guarantee of the accuracy of the plans.*

Risks are not assumed unless a person has or ought to have knowledge and comprehension of the peril to which he is exposed. Knowledge of danger in one degree and of danger in a higher degree are not one and the same thing. Comprehension involves appreciation of its character and extent to form a basis for decision. It is a question of law here because everything is in writing including Exs. 22 and 25, upon which latter the trial judge put great reliance and held that: "Thus, notwithstanding this specific warning, affording him an unusual *locus poenitentiae*, he pressed on to the indicated outcome." (R. p. 42).

Dean v. Hershowitz, 119 Conn., 398, 412.

Exhibit 22 was a letter from Brewer to R. J. Ross, defendant's manager, pointing out various so-called "unbalanced" items in plaintiff's bid. *A careful analysis shows that it was not a warning to withdraw the bid; did not contain any reference to any items on which our claims are based,* and, in particular *did not mention* "preformed cradle, *erroneously located underground structures,* that no "outlet existed, nor *changes in methods of construction, nor underground conditions, nor anything else that actually affected the work, so the theory of the Court is without foundation, is clearly illogical and unreasonable, especially when Ex. 25, plaintiff's reply—stated it was anxious to obtain the contract and perform it "in accordance with the plans and specifications."*

Defendant *did not plead nor prove any modification of the terms of the contract.* Ex. 22 was written *after the bids*

were submitted and opened. Moreover our Ex. PP, shows without contradiction, not only that the "unbalanced bid" was not responsible in any way for our losses, but that because of it, as the material and quantities actually used on the job, at the unit prices, proved, we reduced our losses by $4,211.00. (Mr. Buck's Evid., pp. 793-4). (Mr. Ciraci, pp. 741-43).

In *Freund v. United States,* 260 *U. S.* 60, this Court says: (as to a contended modification of the contract)

"We think there was no acceptance of the new route under such circumstances that would bar recovery for what the services were reasonably worth . . . They had been nursed into making the bid and giving the bond . . . At the time the contract was executed, the department had formed the purpose to thrust on the contractor this burdensome route . . . We cannot ignore the questionable fairness of the conduct of the government, aside from the illegality of the construction of the contract insisted on . . ."

And in *E. & F. Construction Co. v. Stamford,* 114 *Conn.,* 250, our Supreme Court *held plaintiff was still entitled to rely upon the plans and specifications in any modification of its bid.*

No *modification of the contract was pleaded, nor did defendant show that plaintiff "understood" the contract was modified by Exhibit 22—plaintiff's letter, Exhibit 25, conclusively shows it understood that it was taking the contract in accordance with the plans and specifications.*

Utley v. Donaldson, 94 *U. S.* 29.

Defendant did not place any *reliance* on *Exhibit 22,* as it was *used only to cross-examine Mr. Ciraci,* and *was not offered in evidence until the trial judge inquired about it being laid in.* (p. 965). Defendant *abandoned the theory that plaintiff's losses resulted from the "unbalanced bid",* and, in argument, *set forth the "warning, and chance to withdraw" theory, which the trial judge accepted. This point is em-*

phasized, because the trial judge reserved discussion of these letters as a *climax to his denial of any equitable relief viz*: "Thus, notwithstanding this specific warning, affording him an unusual *locous poenitentiae, he pressed* on to the indicated outcome." (R. p. 42). The Court on appeal, affirmed the construction of the contract by the trial judge.

Said Court was clearly in error in its construction of the provisions, Exhibit, A, p. 21, Par. C; making the Engineer the Judge, which, in effect, makes him the sole judge of the law of the contract, whose conclusions are final or a condition precedent to all payments either under or outside of the contract and that he can remould the contract by enlarging provisions of it, and enforce it to the exclusion of any discretion in the court, leaving plaintiff without any remedy unless he concedes liability. This does not make for justice, and it is against the weight of authority and public policy.

137 *A. L. R.* 530ff, Annotation and cases cited.
Salt Lake City v. Smith, 104 *F.* 457.
Clover Mfg. Co. v. Austin, 101 *Conn.,* 212, 214.
Freund v. United States, 260 *U. S.* 60.

In the *Freund* case, *supra,* Mr. Chief Justice Taft says:

". . . Such contract provisions have been interpreted and enforced by executive officials as if they enabled those officials to remould the contract at will . . . This does not make for justice; . . . These considerations . . . have made this Court properly attentive to any language or phrase of these enlarging provisions which may be held to limit their application . . . to what should be regarded fairly and reasonably within the contemplation . . . when the contract was entered into . . . This relieves us of considering conclusions reached by the Court of Claims."

In *Clover Mfg. Co.* case, *supra,* the *Connecticut Supreme Court* says:

"Bad faith may not amount to fraud or dishonesty . . . An engineer assumes a positive responsibility, and impliedly agrees that in making his decisions he will exercise the care to be expected of his calling to ascertain the facts, and will

be governed by the terms of the agreement . . . The parties bargain for some reasonable degree of expert knowledge of the facts and of the contract, and an Engineer who fails to give the parties what they bargained for . . . may justly be said to have acted in bad faith."

In *Gammino v. Dedham,* 164 *F.* 593 (a case typical of the weight of authority), the Court says:

" . . . The clause cannot be interpreted so as to deprive the parties of their rights to a judicial construction of the contract, so far as such construction involves matters of law relating to the present right of the plaintiff to maintain suit, and . . . whether plaintiff has received such compensation as he was legally entitled to under the provisions of the contract and under the evidence."

In *United States v. Stage Co.,* 199 *U. S.* 414, this Court held despite exculpatory provisions, that while it was their purpose to require extra or different work without additional compensation, as the Postmaster General had very considerable discretion, yet there *must be a limit to the power, otherwise he could ruin a contractor by new and wholly unanticipated demands,* saying:

" . . . Can such enormous increase of the service required and the expense entailed be exacted of a contractor who had agreed to perform new or additional services of the kind specified without additional compensation? . . . If this were a contract between individuals, a claim of a right to this additional work would hardly be seriously considered."

In *Salt Lake City v. Smith,* 104 *F.* 457, the Court says:

"The stipulation that the contractors shall do such extra work in connection with that described in the agreement as the city engineer . . . may direct is effectually limited by this fact to such extra work of proportionately small amounts as was necessary to the construction of the contemplated conduit . . . The stipulation in such contracts that all questions, differences, or controversies which may arise between the corporation and the contractors shall be referred to the engineer, and his decision thereof shall be final and conclusive on both parties, does not give the engineer jurisdiction to determine that work which is not done under the

contract and specifications, and which is not governed by them, was performed under the agreement and is controlled by it, and his decision to that effect is not conclusive upon the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it on himself by erroneously deciding he has it."

The court erred in restricting plaintiff to recovery under the contract as enlarged by its construction of the powers of the Engineer and denying recovery altogether on all of its claims for reasons stated in its decision concerning the exculpatory provisions of the contract.

In effect, it would be impossible to recover anything, for these provisions, literally construed, are broad enough to prevent it. For that very reason a majority of the Courts both State and Federal have allowed recovery outside of the contract—on equitable grounds, because they have recognized that it is inequitable to throw all risks of loss on the contractor, while the owner has and retains the benefits of the additional work, is unjustly enriched, and the courts are powerless to restore the *status quo.*

It is, we submit, clearly apparent that no equitable considerations were given by either the trial judge or the Second Circuit. The trial judge found that no basis of equitable appeal existed because of the exaggeration of the claims both in kind and amount, and the letters asking for more time did not mention the delays now claimed, and the exhibits 22 and 25. *He did find that plaintiff had sustained a substantial loss of over $20,000,* exclusive of depreciation on its equipment and of any profits. (R. p. 41). He also found that the work was completed on April 1, 1938—3 months after the completion date, and surface work had been given to two approved subcontractors at a cost of about $5000, and that defendant paid one of these subcontractors additional amounts to complete the work. Plaintiff claimed that it lost profits on the *contract* of $25,000; and on the *extra work,* $15,000, making the total cost $199,908 for the entire sewer.

It would have been better if plaintiff had refused to go ahead unless written orders were given, or a satisfactory agreement made as to the unforeseen difficulties, and inserted the causes of the delay in the two letters. But want of caution and the existence of faith and reliance on defendant's promises should not be held to be a waiver, or to deprive it of a valuable right.

Sartoris v. Utah Constr. Co., 21 F. 2d, 1.

Looking backward, it can now see that defendant's promises did not amount to anything, eg. the promise to give consideration to extensions of time when the work was completed—and its prompt appropriation of every dollar possible for liquidated damages. Neither did it then know that an outlet would not be ready as promised; nor that defendant would seek to evade payment of $22,626 worth of cradle work by admitting it would pay for the "grout"; nor that it would give written orders for 4 small matters costing less than $450, and thereby seek to justify its position as careful even in small matters, while it orally directed work at additional expense of $68,632. Neither did it then know that this defendant in Blakeslee v. Water Comrs., 121 Conn., 163, had denied authority in its general manager to make an oral promise to pay for additional expense arising out of war conditions; claimed that a receipt for a final payment of the original contract price was a release in full, even at the time it was negotiating with the contractors to settle their claim for such additional expense, and attacked the constitutionality of the very Act it had sponsored to enable it to pay for such extra expense; nor that defendant stood by there, as here, and saw all the work being done and sought to keep and retain the benefits without paying therefor.

Prima facie, plaintiff's losses and lost profits should have been the measure of its recovery, especially as defendant did not prove that they were unreasonable or extravagantly made, and no claim was made that plaintiff was incompetent,

nor that its work had not progressed satisfactorily nor any other complaint made as defendant could have done under Exhibit A, p. 27, par. M 1.

Dean v. Conn. Tob. Corp., 88 *Conn.*, 619, 624.

This seems conclusive that defendant realized that work of great magnitude and expense was being placed on its property, when it knew it was not covered by the contract, *reasonably construed*, to embrace what the parties had in mind when they made it.

These claims could not be reasonably called exaggerated when it took 9 months to complete the work on a six months contract, an increase of 50% of the time consumed; and when the extra cost was almost exactly 50% of the contract price.

Tompkins v. Bridgeport, 94 *Conn.*, 659.
United States v. Behan, 110 *Conn.* 338, 344.
Montrose Contr. Co. v. Westchester, 94 *F.* 2d. (2d. Cir.) 580.

These cases hold that it does not lie in the mouth of the party who has caused losses to an injured party, to say that the party injured has not been damaged by at least the amount he has fairly and in good faith laid out and expended, unless he can show they were extravagant and unnecessary. The burden is on defendant to prove that fact. This defendant totally failed to do under a proper construction of the contract, and the application of equitable principles.

CLAIM NO. 1.

The Court clearly erred in holding that the contract, supplemented by four blue prints, incorporated by reference, reasonably indicated or required pouring the concrete cradle and allowing it to harden before the pipe was laid upon it.

The Court bases its conclusion solely upon interpretation of Type C construction as set forth in Exhibit C.

Exhibit C has only *two notes* relative to Type C. *One* provides:

"If any pile foundation under reinforced concrete pipe is ordered, concrete cradle and pile cap will be paid for under the item for Class A Foundation Concrete."

This provision clearly does not apply, as it was admitted that no pile foundation nor pile cap was ordered or used on the entire work, including the river crossings. Mr. Brewer, defendant's Engineer in charge so testified. (Evid. pp. 942, 943).

The *only other note* provides:

"Type C construction will be paid for at the price bid for Type A construction *plus the cradle concrete* and *plus cradle reinforcing* if any is used."

Type A, under Exhibit C, was to be constructed by laying the pipe on the bottom of the trench, and *pouring* and *tamping fine gravel,* or *a mixture of equal parts of crushed stone and sand,* tamped in place.

Type C, therefore, had *two* different constituents:

1. *Cradle concrete* was *substituted* for the *gravel or said mixture;* 2. *Reinforcing.*

The Circuit Court does not explain *why* Exhibit C shows Type C was to be *preformed.* The trial judge held that the provisions in the contract for preforming the cradle "are not wholly free from ambiguity." (R. p. 33). If they were *ambiguous,* under well-settled rules of construction, they

should have been construed *strictly against defendant,* and *in favor of the plaintiff. This is especially true when it was admitted by defendant that it knew of no other place than in Hartford where such preforming of cradle had been used, and that it had used preforming in only three out of the eighteen contracts for this entire project.* (Evid. pp. 938, 939, 872). *Plaintiff had never before heard of "preforming" a cradle in its 25 years of experience in similar work.* (Mr. Ciraci, p. 462). *Inasmuch as the use of such "preforming" was local to Hartford, and very limited even there, it is only logical to conclude that such a requirement should be described in such a way as to leave no ambiguity or doubt as to what defendant would require of plaintiff in this work.*

Alvord v. Belden, 4 *Conn.,* 461, 464-5.

There is a provision in the specifications which show that defendant *was able* to *fully describe* "preformed" work. Exhibit A, p. 63, par. 65, *fully described the preforming and curing of pipe.* Under one method of "curing" such pipe, it specified "until 6 days old"; and the other: "until they are 3 days old."

Had it desired to reasonably disclose to plaintiff and other bidders that preforming or curing would be required in Type C construction it would have been the easiest thing in the world to accomplish! *Fair* and *honest dealing* would seem to *require* it to *plainly specify its purpose to "preform" the cradle;* and it was a *concealment* and *non-disclosure* to have omitted such an *important feature* of the *desired work* for a *distance of 1093'; at such an additional expense*— $22,626 to plaintiff. Rightfully, *it should have been specifically described* and *formed an important part of the agreement about which there could have been no doubt.*

Alvord v. Belden, 4 *Conn.,* 461, 464-5.
Home Owner's Loan Corp., v. Stevens, 120 *Conn.,* 6.

The Court could not, then, *reasonably conclude* that the "cradle concrete" which was to be substituted for gravel or a mixture of crushed stone and sand, under Exhibit C, was to be *preformed.*

The only other feature different in Type C from Type A is *reinforcing,* which means placing steel in such a way as to strengthen the construction. Reinforcing could be required on any Type of construction, except Type A. It is a *strained construction of the contract to hold that the presence of reinforcing would reasonably indicate to plaintiff that the concrete was to be preformed.* The *testimony of defendant* shows that such reinforcing *could be used on the cradle work,* (as it was specified in Exhibit A, p. 71, par. 82, which is a Special Provision, and was to govern under the provision in Exhibit A, p. 40.) by *placing the steel on sills,* or *by boring holes in them and placing the steel therein.* (Mr. DeMay, Evid. pp. 1016-17).

There is, then, we submit, no reasonable basis for the Court's construction of Exhibit C to require "preforming" the cradle under the *second* note, *either under part one substituting concrete cradle for fine gravel, or mixture of crushed stone and sand,* or *under the other providing for reinforcing.* Exhibit *D,* which the trial judge found *confirms such construction to require preformed cradle on level ground, does not pertain to Type C, but to river-crossings, solely.*

The notes on the *plans* relied upon by the Circut Court *are controlled by the "Special Provisions" of the specifications,* Exhibit A, p. 71, par. 82, where *all types of cradle construction is specified in detail,* and *govern* under Exhibit A, p. 40 (near bottom). *Its conclusions, then, we submit, have nothing to reasonably support them, and its construction of Exhibit C is clearly erroneous.*

Both Courts *relied largely* upon the *great power* given the *Engineer,* in Exhibit A, p. 21, par. C. But under Exhibit

A, p. 71, par. 82, *he was expressly limited* to a *choice* of *two methods, neither of which mentions preformed cradle, and no reasonable construction of that paragraph authorizes him to order it.* That paragraph says: "The Engineer will direct which method to be used."

These *two methods* of constructing *cradle* are briefly:

"82. In types B-1, B-2 and *C* construction . . . It is expected that the lower portion of the fill will be placed as each pipe is laid so that the compacting may be done not only on the side of the pipe but also in front of the pipe just laid; the remaining fill to follow closely.

"Where foundation concrete Class B is ordered, the pipe may be laid upon approved sills and the concrete poured in place underneath and around the pipe or the sill may be set and the concrete poured to a point slightly above the bottom of the pipe, and the pipe immediately laid upon the fresh concrete and sills; the remaining concrete to follow closely. The Engineer will direct which method is to be used."

It is submitted that these *notes* on Exhibit C, and the *specifications* "negative" the *time interval for curing,* under the proper construction of them, and bearing in mind that *curing* could have been *expressly provided* in them, and that *this method of construction* was *most unusual,* and *confined strictly to three contracts in Hartford,* and that *plaintiff* had *never heard of preforming a cradle* in its 25 years of experience on *similar sewer work.*

The Engineer certainly could not "remould" the contract and enforce it, nor construe the law and the facts of the contract and apply them, as both Courts held. It is against public policy.

> *Freund v. United States,* 260 *U. S.* 60.
> *Salt Lake City v. Smith,* 104 *F.* 457. (8th. Cir.).
> *Annotation,* 137 *A. L. R.* 542ff, and cases cited.

To require *preforming the cradle* was not the *exercise* of *a reasonable degree of expert knowledge* on the part of the

Engineer, and amounted to *bad faith* on his part. Bad faith need not amount to fraud or dishonesty.

Clover Mfg. Co. v. Austin, 101 *Conn.,* 212, 214.

The Court clearly erred in holding itself so inexorably bound by the Engineer's interpretation and construction of the contract terms, which in effect, made the Engineer the sole judge of the law and the liabilities arising out of the contract, and that he must approve of or concede liability for a claim or it was invalid.

Annotation, 137, *A. L. R.* 542ff, and cases cited.

The Court clearly erred in holding plaintiff made no objection at the time the work was done that it was an extra or would delay the completion of the contract.

This is *contrary to defendant's own evidence.* Mr. Brewer testified (p. 884) as follows:

"The Court: I understand that he did make some protest along two lines. The first was that he could lay Type B faster, whatever name he may have used in describing it, and the other was that he was having to do extra work on the grouting." The witness: "That is right . . . In fact, on sills, he could lay faster than he could with the preformed cradle." (p. 881); "Mr. Ciraci spoke about the grout, and he said it was not specified on the plans he thought he should be paid extra for it."—as soon as blueprint Ex. F was handed to him the first of July just before the work started (Evid. pp. 870-1); "In fact, there was no description of that *method of construction* in the *specifications.*" (Evid. 872). Mr. Ciraci testified that on at least *two occasions* Mr. Brewer told him that "he need have no fear doing anything which the District ordered as it always paid contractors fairly for anything done on its instructions if not called for in the plans and specifications" (Ex. H, pp. 2-3; Evid. p. 482, viz: Q. Did you ever claim an extra for it until the work was done? A. No, because I understand that anything that was extra we would get paid for. Q. When was that understanding arrived at? A. In July. Q. With whom? A. Mr. Brewer.

Q. At the time when you spoke to him about the preformed cradle he made it all inclusive? A. Yes, that anything that was extra that was not covered by the specifications, if I could prove it was not covered by the specifications, would be extra. . . . Q. So you saw no necessity of making claim for these various items as extras as you went along?' A. No. We just made a notation ourselves . . . I thought the inspector was making his notation, too"); and Ex. H, p. 3 where Mr. Ciraci asked Mr. Root, Chief Inspector to let him talk to Mr. Brewer, as the work as ordered was making a very considerable delay in the job. This was July 2, 1937—the second day after beginning work on the contract. Shortly afterwards Mr. Brewer visited the work and confirmed Mr. Root's instructions, and assured him the District would compensate him fairly for any extra work.

It is respectfully submitted that these circumstances fully justified petitioner in its understanding that any extra work provisions were *waived,* and a *new arrangement* made as to any work which was in fact extras on the entire job, and that it would pay him reasonably for such work when the whole job was finished, and *dispensed with the necessity to file any written claim.* It also *explains* why he *continued to furnish labor and materials of great magnitude because he relied on Mr. Brewer as he was an Engineer* (Evid. pp. 386); *and would not have done this work for which extras are claimed if payment had not been promised when the sewer job was complete.* (pp. 261-2). It *also explains why he thought it unnecessary to refer to these causes in the two letters, Exs. U and V, and continued to do such work after receiving replies thereto from defendant relative to extensions of time to complete the job, wherein respondent promised to give such requests proper considerations,* but subsequently withheld the full $20 for every day possible from date of completion stated in Ex. A—December 31, 1937. It would certainly not be a "natural impulse" to again speak of any delays and extra expense when he thought he had been promised pay for *all extras when the sewer was completed,* any more than to remind defendant, from time to time, he had a contract to do the sewer work, Ex. A. As to

plaintiff, the requirements of the Engineer were no more clear than it was also clear that any extra work would be paid for, including this work.

The Court clearly erred in holding "no actual delay was proven. Plaintiff's records are far from complete, and one important diary is lost". A full set of books are in evidence (Exs. FF and GG; time books; a diary, HH; Ledger, Ex. II; a Journal, Ex. JJ; concrete bills, Ex. KK; quantity of stone used, Ex. AA; cost of job, analyzed and summarized by a Certified Public Accountant, Ex. OO; and especially, for *this claim, computation of actual cost of Claim No. 1,* (Ex. K), and a summary of the cost of the entire job, (Ex. J), all of which books were kept by plaintiff, in the regular course of business by a bookkeeper, under the supervision of Mr. Ciraci, (pp. 240, 312). While one diary was lost, and could not be found, *it had been used in making up the itemized claims* (Mr. Buck, Evid. pp. 782-3); and the total figures claimed are reasonable and accurate, as *every effort was made to avoid duplication of items.* (Mr. Buck, Expert Cost Accountant, Evid. pp. 1197-8, 784); and that the work was disrupted and disorganized by reason of all work for which extras are claimed, (p. 819), and Claim No. 1 is reasonable (p. 765); and on the basis of the evidence it would disrupt and disorganize the work radically (p. 819); the chief thing that will run into money is due to the delay while the cradle cured, but other things would amount to a substantial sum over the entire job, the excavating, the grout, the labor grouting, and screeding, and form work (p. 766). On defendant's testimony, the possible delay is computed as 41 days delay as against ours of 77 days, (Mr. Stevens, employee of defendant as inspector and cost accountant, p. 1146), on the basis of which Claim No. 1 would be about $14,775; but he *erroneously divided this by 3, the number of gangs, a definitely incorrect method* (Mr. Buck, pp. 1209-11). The Books of defendant are admitted by it to be inaccurate (Mr. DeMay, p. 974). Mr. Stevens figures based thereon are therefore incorrect and misleading. His crowning basic

error, however, was his allocation of all this work into *four locations* and used our word section to designate each, whereas we used *section* to *designate a cradle 30′ to 40′ poured at one time.* Thus *his* section at No. 4 is actually *eight* sections, and are actually *two locations* instead of *one;* he specifies South of No. 3 as *three* sections, when there were *nine* poured; and *six* sections poured South of No. 2, and *five* between Nos. 1 and 2 crossings. Using his figures logically carried out, we have, North and South of No. 4, 12 sections at $284.93, cost of gang, times 4 days each section, $13,700.00; *6* sections South of No. 3, plus *5*, between Nos. 1 and 2, and *9* North of No. 2 or *20* sections times 4 days delay, at $237.63, total $19,000; Grand Total, $32,700 as against our claim of $22,626.

We have used Mr. Brewer's own testimony of an average of 4 days delay in the above figures. The Court's conclusion that the preformed cradle "facilitated" rather than delayed progress (R. 32) is, therefore, *arbitrary, illogical* and *unreasonable; is against the evidence of both parties, and unmistakably shows that his conclusions are erroneous as matters of law on admitted facts.*

Systematic planning was impossible on account of waiting, in some areas, for the trench to be opened up, before ordering preformed cradle, and the limited working area where the fences, dykes, river-crossings etc admittedly made such planning impossible. (Mr. Brewer, p. 948), (Ex. H, pp. 1-25). Consequently the conclusion that the *most natural method of manufacturing* it was by "curing" and the *other like conclusions are contrary to the undisputed and admitted facts, and clearly are erroneous, illogical,* and reversible.

The Court was clearly wrong in failing to hold the Exs. F and G constituted "Orders in Writing" within the meaning of the contract. They were *detailed blueprints of the work to be done, signed by Mr. Brewer, and handed to Mr. Ciraci by him. The fact that no price for the work was*

fixed does not prevent them having this legal effect; and they are waivers of the written order provisions; defendant is estopped thereby. They *do not serve as illustrations* of the *work under the contract,* but *specify new and different work upon which the minds of the parties never met.*

Sartoris v. Utah Constr. Co. 21 *F.* 2d. 1.
Certoarari denied, 278 *U. S.* 651.
Expanded Metal Etc. Co. v. Noel Constr. Co., 101 *N. E.* (*Ohio*) 108.
Lantry Etc. Co. v. Atchinson Etc. Co., 172 *P.* (*Kan.*) 527.
Munro v. Westville, 36 *N. S.* 313.

The importance of the "grout" was entirely overlooked or disregarded by both Courts. It was evidently confined to the *cost of the material* which is *comparatively insignificant.* It is a rich mixture of sand, cement and crushed stone. Its *real importance* is that it really *transforms* the plans from one *method of construction, described in the plans and specifications, to one vitally different because it requires "preforming"* or "curing" *before the pipe is laid.* The Courts failed to appraise and value the importance of it. *It is then, a pure question of law* whether plaintiff should recover under a proper construction of the contract, and the application of the admitted facts. It necessarily follows that plaintiff suffered direct and consequential damages from this *method of construction.* It proved its costs, and lost profits with its own and defendant's testimony, and with its books kept in the regular course of business, now in evidence.

It is respectfully submitted that it is evident the Court misconstrued the contract, failed to grasp the practical problems involved and the engineering and construction problems; reached its conclusions on erroneous principles of law and failed to apply equitable principles but reached conclusions that are clearly against equity and good conscience, and results in extreme hardship to plaintiff while defendant

received and retains the benefits thereof, and other reasons herein given. *They are all pure questions of law and reviewable here.*

CLAIM NO. 2.

The Court was clearly *wrong* in holding that the "dotted lines" on Ex. B did not *mislead* plaintiff, because it was on notice its contract was part of a larger project, and Exhibit B itself showed that the point marked as the "Beginning of contract No. 18" (plaintiff's contract) was the "End of contract No. 16". "There was no justification for assuming that the dotted lines indicated as existing sewer. Moreover, several weeks before Mr. Ciraci signed the contract on behalf of the plaintiff he knew that there was no outlet at Farmington Avenue . . . The claim was properly held untenable". (133 F. 2d, 469-70, par. 3).

Plaintiff's testimony shows that these "dotted lines" could not be reasonably interpreted other than that they indicated an existing structure. (Mr. Buck, pp. 767-8) and (Mr. Ciraci, p. 21-23, Ex. H); that everywhere else "dotted lines" indicated existing structures, sometimes labeled, others not, (p. 767-8). The trial judge suggested this was not a natural interpretation—that his impression, without any complete knowledge of the plans, was that "existing sewers" are marked "existing" and *this* is not. (p. 767). Mr. Buck explained that it was a "symbol", and wherever it was used on the plans it indicated an existing structure—and "no other interpretation could be put on them than to indicate "existing structures". (pp. 767-8). Mr. Ciraci had read plans for 25 years and "dotted lines" *always indicated existing structures* (pp. 365-6; 369); that he expected to be able to drain this work into this outlet (p. 366); had never before found such an outlet could not be used to do so, (p. 376); just had to put a ball cap in front of pipe and no dirt will go into old sewer—just the water (p. 376); everywhere else

he could "assume" the outlet could be so used (p. 377); if such outlet was not to be used, it must be so specified on the plans by some reasonable notation to that effect (pp. 367, 377). Mr. Buck testified good engineering practice required the plans to include all information to enable contractor to make an intelligent bid, and a complete analaysis of what the Engineer required; where no outlet exists the plans should bear a note describing the situation and state what the Engineer expects him to do with water in the work; unless noted in the plans, always construct a sewer up-grade; if no outlet exists it considerably increases the cost of the work and especially so here where the under-drains were picking up and discharging water right at the point of digging and laying pipe which immeasurably increase the difficulty of the work. (pp. 768-770). Defendant *did not dispute these interpretations* of the "dotted lines"; and agreed with us as to good engineering practice, and that an outlet was of tremendous importance; that here a bidder could not have ascertained whether or not an outlet *actually* existed *unless he asked questions* (Mr. Brewer, pp. 916-917); if an outlet existed, gravity would discharge the water and it would flow away (p. 917); plaintiff had no outlet until all work nearly completed, about which nothing was said; the plans would be acted upon by bidders and mistakes in the data would put a bidder at a disadvantage (p. 914); there was no information in the documents submitted to bidders to show how the work was to be affected other than a general reference to this being a part of a larger project—and no reference was made to contract 16; nor that it was incomplete; although Mr. Brewer admitted it *ought to have been referred to or listed,* as *he knew No. 16 would not be completed for eight months* (914-920).

The Standard Clause (Ex. A, pp. 28, par. N: 3: and par. 50, par. 29) about pumping did not embrace this item of extra cost—only pumping and keeping the working point dry for laying joints (Mr. Buck, pp. 805-6); this can be done with a small 2″ pump which passes the water into a

few lengths of pipe and it flows away automatically in this—a gravity flow sewer (Mr. Buck, pp. 768-770; 805-806); (Mr. Ciraci, pp. 393-4); water accumulated from ground water, rains and floods and had to be pumped out (pp. 393-4) because the water had no place to go. All of it would have flown away if an outlet had existed (p. 395) (Mr. Buck, pp. 805-6); (Mr. Brewer, p. 917).

The trial judge erroneously held, as a matter of law, under the provisions of Ex. A, p. 50, par. 29, this claim was clearly untenable because plaintiff agreed to provide all necessary pumps and satisfactorily remove the water; that the river was a natural outlet and if an outlet existed the grade was insufficient and that the sewer was not designed for ground water. (R. p. 36). *Such a construction is plainly contrary to the evidence of both parties, and is unreasonable and illogical.* After the river-crossings were built there was no outlet to the river (p. 396). The plans show that, except at or near these crossings, the river was too far way too be an outlet. The sewer was, concededly, a gravity one and sufficient to flow the water away. The provisions cited applies only to pumping ground water at the point where the pipe is laid, and the plans showed practically no ground water at all. (Ex. B).

Both Courts were clearly in error in placing so much importance on the provision that this "was but a part of a larger project". Fair dealing would dictate that the *duty of disclosing all information affecting the work rested solely* on *defendant.* It, *only,* knew, or had the means of knowledge, of *where* and *how* other projects would *affect* this work. It had superior knowledge, as it had supervised and inspected all other work performed. To require a bidder to search out all defendant's records of 17 contracts, we submit, is unreasonable, when defendant had all of it at its finger tips *and was under the highest duty to disclose to bidders how and where his work would be affected. It is only fair play, common sense and honesty to do this. How*

could plaintiff *cooperate* with other contractors when it was *not informed* as to the *condition of their work* or *how* it *affected* the *work it was to do? In spite of the admitted short comings of defendant,* the Courts passed over them, and *held plaintiff responsible for them*!

The same argument holds true as to the notation that this is the "Beginning of contract No. 18" and the "End of contract No. 16" *so much relied on by both courts.* Reasonably, this merely denotes the *place, not the condition,* where *plaintiff's work was to begin*! It could not possibly *connote* that *contract No. 16 was incomplete,* and that it *would not be completed until this work was also completed.* It was the *highest duty of defendant* to *point out* all the *conditions* that would *affect* this work. This it admittedly did not do! (Mr. Brewer, p. 915-990). Courts may not thus *reverse* the *rights* and *duties* owed to each other by the contracting parties!

It was unreasonable to hold that a personal examination by a bidder of the terrain shall excuse such *wilful defaults of defendant,* who *knew* in *detail how* and *where* the *conditions* of *other work* would *naturally affect the work to be let*! After all, some *honesty* and *fairness* is *due a bidder* on a contract. He is not expected to *search the minds* of the defendant; it was under a duty to speak. Every party to a contract has a right to assume he has been fairly dealt with, and that disclosures have been made as to all important information which will affect the work to be done.

Water Comrs. v. Robbins,, 82 *Conn.,* 641ff.

Plaintiff did not know, when it submitted its bid, that there was no existing outlet. It discovered there was not, after the bids were opened. Mr. Brewer then told Mr. Ciraci that there was none, and said he expected it would be ready in about six weeks. Relying on this, plaintiff changed its plans of operation; and when extra pumping was being done,

relied on Mr. Brewer's promise that if any extra work was done, it would be paid for. Mr. Brewer denied any such promise, but the trial judge made no finding on this point, placing its decision on Exhibit A, p. 50, par. 29, and that Mr. Ciraci examined the terrain before he made his bid and there was no excuse for a misunderstanding here (R. pp. 36-37), which involve pure questions of law. It is evident that no sum was included in the bid to cover the contingency that arose. Defendant, in its pleadings, relied solely upon the provisions of the contract. The Circuit Court placed its decisions *on issues not raised by the pleadings*, and *not embraced in the findings*. Plaintiff did this work, reasonably relying on its understanding that it would be paid for, and that it would have an outlet in six weeks. It is submitted that it should recover on this claim.

Horgan v. Mayor, 55 *N. E.* 204.
United States v. Spearin, 248 *U. S.* 132.
Annotation, 76 *A. L. R.* 268ff, and cases cited.
Tryon v. White, 62 *Conn.*, 161ff.

CLAIM NO. 3.

This claim is for $11,835, and embraces 5 items as set out in the Statement.

The Court erroneously excluded this claim because of the warnings on the plans, and the provisions of Exhibit A, p. 28, and p. 49, par. 28. (R. p. 37) and 133 F. 2d. 470 (4); and because they were underground structures and no claim was made in writing when the work was done.

These principles have been discussed elsewhere herein. Recovery depends on the construction of these provisions, and embrace pure questions of law.

CLAIM NO. 4.

Furnishing of stone, as ordered, was expressly made an extra under Item 17, Exhibit A, p. 46.

The Court erroneously held Item 16 applied.

Item 16 provides when stone is to be used; Item 17 for payment.

CLAIM NO. 5.

The Court clearly erred in denying recovery because concededly plaintiff constructed the river-crossings in accordance with the plans and to the entire satisfaction of defendant's Engineer. There was an implied warranty of sufficiency of the plans for the purpose for which they were intended.

Tompkins v. Bridgeport, 94 *Conn.,* 659, 680.
United States v. Spearin, 248 *U. S.* 132.
Christie v. United States, 237 *U. S.* 234.

The Court clearly erred because defendant waived or is estopped to escape payment by waiting to test these crossings as provided under Exhibit A, pp. 68, 69, par. 79, until they were fully completed and backfilled, necessarily increasing the expense of testings.

CLAIMS NOS. 6, 7 AND 8.

No. 6. This private drain was unknown to either party until it was encountered in the trench. The Court clearly erred in excluding it as an underground structure, under Exhibit A, p. 49.

No. 7. The Court clearly erred in rejecting this claim under Exhibit A, pp. 45-6, pars. 14 and 15; because par. 14 placed ultimate liability on plaintiff for damages due to settling, etc.

Annotation, 137 *A. L. R.* 530ff.

No. 8. The Court clearly erred in denying recovery under Exhibit A, p. 56, par. 49, because payment for all steel is provided for in Item 16, p. 81, Ex. A.

CLAIM NO. 9.

The Court clearly erred in rejecting this claim because it was an underground structure.

CLAIM NO. 10.

The Court erred in rejecting this claim, because the by-passing of this sewer was paid as extra (Ex. 6). Cost of pumping the sewage was also an extra, and should have been paid.

Henderson Bridge Co., v. McGrath, 134 *U. S.* 260.
Sartoris v. Utah Constr. Co., 21 *F.* 2d, 1.

CLAIM NO. 11.

The Court clearly erred in rejecting this claim under Exhibit A, p. 50, par. 29.

CLAIM NO. 12.

The Court clearly erred in rejecting this claim under Exhibit A, p. 76, par. 98, when it should have been allowed under par. 100, and payment made under Item 1, Exhibit A, p. 13.

CLAIM NO. 14.

The Court erred in rejecting this claim under Exhibit C, and Exhibit A, p. 46, par. 17, when it should have been paid under Item 9, p. 79, Exhibit A, a Special Provision which governed.

CLAIM NO. 15.

The Court clearly erred in holding the delays were not due to any deviations by defendant from the terms of the contract.

This item depends on the construction of the contract and the application thereof—a pure question of law.

Owen v. United States, 44 *Ct. Cl.* 440.

CLAIM NO. 16.

The Court clearly erred in not allowing full recovery, because no Counter-claim was filed as required by Rule 13 (a) of Federal Civil Procedure; and by failing to hold defendant waived the provisions of Exhibit A, p. 25 I (3); or is estopped to deny liability when it keeps and retains the benefits.

Connelly v. Devoe, 37 *Conn.,* 570.
O'Loughlin v. Poli, 82 *Conn.,* 427, 435.
Williston, Contracts, Sec. 789, p. 1511. (1924 Ed.).

CONCLUSION.

Under the applicable decisions of the Supreme Court of Errors of the State of Connecticut, governing the local law of contracts; the applicable decisions of this Honorable Court, governing the general law of contracts; of the applicable decisions of the different Circuit Courts of Appeals, which seem conflicting; and the applicable decisions of the weight of authority of State and Federal Courts, on the general law of contracts of this kind, it seems clear that The United States Circuit Court of Appeals erred in affirming the judgment of the District Court. The questions involved are of general importance, and it is in the interest of the

public to have an authoritative decision as to the general law of such contracts involving extensive public improvements, and it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE H. COHEN,

A member of the Bar of the United States Supreme Court,

and

UFA E. GUTHRIE,

Counsel for petitioner-plaintiff.

36Pearl Street, Hartford, Connecticut.

No. 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

MIDDLE WEST CONSTRUCTION, INCORPORATED,
Petitioner

v.

THE METROPOLITAN DISTRICT,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

W. ARTHUR COUNTRYMAN, JR.,
Counsel for Respondent
15 Lewis Street,
Hartford, Connecticut

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TABLE OF CITATIONS

STATEMENT

This action was brought by the petitioner for extra compensation in connection with a contract entered into with the respondent for the construction of a section of an intercepting sewer in the City of Hartford running from Albany Avenue on the North to Farmington Avenue on the South where it joined another section being constructed under another contract. The contract covered the construction of 6527 feet of sewer in the valley of the Park River which it crossed at four different points. The contract was entered into under date of June 16, 1937 as a result of public bidding, wherein the petitioner was the lowest bidder in accordance with unit item prices listed in the contract. The total cost of said sewer figured on these prices came to $136,639.93. The bids were made upon the basis of a printed document setting forth information for bidders and the proposed form of contract with specifications (Ex. A) which was supplemented by four blueprints incorporated in the contract by reference (Exs. B, C, D and E). These documents taken together became the contract and specifications under which the work was to be done.

The petitioner's complaint upon which the original action was brought contained fifteen claims for compensation over and above the amount of the bid on which the contract was awarded but it has now dropped claim No. 13. There was also an additional claim for refund of the amount deducted from the contract price by the respondent as liquidated damages for failure to complete the work by the date fixed in the contract after certain allowances had been made for days upon which the work could not be pursued.

The petitioner claims added compensation for the construction of what is known as a preformed or precast concrete cradle required by the respondent's engineer to be used in certain parts of the work to support the weight of the sewer pipe where the ground conditions were such that it could not otherwise be properly supported. A claim is made for the cost of pumping ground water as the construction of the sewer progressed because of the fact that there was no outlet from the sewer under

construction to a sewer being constructed southerly to which connection was eventually to be made. The other claims were for extra compensation because of the alleged added cost to the petitioner of removing or avoiding certain underground structures which it claimed were not properly shown upon the blueprints which were a part of the contract; for extra stone which the petitioner alleged was necessary in the construction of the work; for testing some of the river crossings which it alleged the respondent's engineer did not require it to test when the work on each crossing was completed; for relaying a private drain which was not shown upon the blueprints; for additional sheeting to support the sewer trench; for additional reinforcing steel in certain parts of the sewer structure; for building a bulkhead in an existing 27 inch sewer and for removing the lower half of said existing sewer and reconstructing said sewer so as to avoid the new construction; for pumping the sewage from a private house sewer which it claimed was not shown upon the blueprints; for laying a temporary line to divert sewage from an existing sewer to the river; for what the petitioner alleged was a tunnel under certain trees of a kind not called for by the contract and for what it alleged to be a special concrete foundation under certain portions of the sewer pipe not covered by the contract. The petitioner also made a claim totalling $14,205.13 for what it claims was the extra cost to it of work made necessary during the winter months because of the other claimed extras which prolonged the construction of the sewer beyond the period when it would otherwise have been completed.

The respondent under the provisions of the contract retained, out of the amount which would otherwise have been payable to the petitioner under the contract provisions, the sum of $3540 as liquidated damages for the failure of the petitioner to complete the work within the time limited by the contract after certain allowances had been made for bad weather and other circumstances. The petitioner claims that all of this amount should be paid to it on the ground that the delays were due to the acts of the respondent and were not due to any fault on the part of the petitioner.

The petitioner made no claim for extra compensation of any kind until February 5, 1938 when the contract was largely completed and it filed no itemized statement of its claim until late in the year 1938, long after the contract had been actually completed. At no time during the progress of the work did the petitioner claim that any work required by the respondent's engineer was not in accordance with the provisions of the contract except in one instance before the work had been started when the respondent claimed that certain material known as "grout" shown on Exhibits F and G, which were detailed drawings submitted by the respondent's engineer to the petitioner, had not been shown in the original blueprint plans. Any extras which the respondent ordered except in one instance were covered by written instructions from the respondent's engineer and paid for in accordance with the extra cost, all to the satisfaction of the petitioner.

It is the respondent's claim that all of the work done by the petitioner, except that specifically covered by the orders for extras issued by its engineer, was within the provisions of the contract and so accepted by the petitioner without protest of any kind during the construction of the work.

The respondent takes exception to many of the statements made by the petitioner in its petition herein as not being in accordance with the facts as found by the trial court and as not being admitted or undisputed facts as claimed on pages 3 to 19, inclusive, of the petition. The allegations made in the statement of the petition are so detailed and voluminous that it is impossible for the respondent to do more than set forth its own version of the facts in connection with its argument of the case. Throughout the petitioner's statement it has stated as facts certain things which were testified to by its witnesses, one of whom was the president of the corporation, Mr. Ciraci, whose testimony the trial court considered so unreliable that it stated (R. p. 29): "Ciraci's testimony and the claims made throughout on the plaintiff's behalf seemed to me so exaggerated as to border on the reckless and I became convinced I could not accept them with any degree of confidence." Wherever Mr. Ciraci's testimony came in conflict with that of the respondent's wit-

nesses, the trial court accepted the evidence as given on behalf of the respondent.

Although the petitioner has attempted to present its various claims as questions of law arising out of the interpretation of the contract provisions, they must all be considered in the light of the facts found by the trial court on the evidence as presented to it. These facts the trial court has found in favor of the respondent except as to the amount of liquidated damages and has found not proven the claims set forth in paragraphs 7 to 26, inclusive, and 28 to 37, inclusive, of the petitioner's complaint. (R. p. 46)

ARGUMENT

REASONS RELIED UPON BY THE PETITIONER FOR THE ALLOWANCE OF THE WRIT

The petitioner has alleged as reasons for the allowance of the writ that the decisions of the trial court and of the Circuit Court of Appeals affirming the trial court's decision are not in accordance with the principles and applicable decisions of this honorable court; that they probably conflict with the applicable decisions of other United States Circuit Courts of Appeal; that they probably conflict with the principles and applicable decisions of the highest courts of other states constituting the weight of authority or the better reasoned cases, and that the case presents questions of the first importance relating to the construction and interpretation of municipal and private building contracts containing clauses such as the ones in the instant case.

An examination of the cases cited in the petition and in the petitioner's brief will show that in every instance the court found in favor of the prevailing party the facts upon which it based its decision. The principles of law set forth in the cases cited by the petitioner must therefore be applied to the findings of fact made by the trial court and accepted by the Circuit Court of Appeals as required by F.R.C.P. Rule 52, 28 U.S.C.A. following section 723 c. This observation holds true

not only of the Connecticut cases cited but also of the citations of the decisions of this honorable court. In no instance will it be found, we believe, that either the trial court or the Circuit Court of Appeals decided the issues presented to it contrary to the weight of authority and particularly to the decisions of the Connecticut courts and of this honorable court. It would make this brief unduly lengthy to attempt to analyze each one of the cases cited. It is particularly significant that the decision of the Circuit Court of Appeals in the instant case differentiates the case of Montrose Contracting Co. *v.* Westchester County, 94 Fed. (2d) 580, which was decided by it in 1937. Judge Swan, who wrote the opinion in the instant case, was one of the judges who heard the Montrose case.

As to the petitioner's statement that the instant case presents questions of the first importance relating to the construction of building conracts, the respondent submits that all of the questions of law presented in this case have already been passed upon by this honorable court and, as stated above, there is no conflict between those decisions and that in the instant case.

PETITIONER'S SPECIFICATIONS OF ERRORS

The petitioner has assigned thirty-three errors in its petition and, by reference, all of the 210 assignments of errors upon which it relied in its appeal to the Circuit Court of Appeals. It is not feasible to discuss these specifications of error in any detail within the limits of this brief and the respondent believes that it will be more helpful to the court to discuss the petitioner's claims in order and to cover so far as possible in the discussion of each claim the specifications of error made with regard to that particular claim.

PROVISIONS OF CONTRACT AS TO EXTRAS.

Before discussing the petitioner's claims in detail, the contract provisions applicable to extra work thereunder require

consideration. It is the respondent's contention that all the claims made by the petitioner are to be determined by these contract provisions unless they were modified either by a new agreement between the parties or by a waiver on the part of the respondent.

The contract, known as No. 18, appears as Exhibit A. The provisions relating to extra work are set forth on pages 21 and 22 under paragraph D, entitled "Changes and Extra Work." They specify that the respondent's engineer may, in writing, order changes in the work and that no claim for payment, in addition to the amount awarded for such extra work, will be considered unless the contractor shall make such claim in writing within certain definite specified periods. The filing of a claim in accordance with the requirements of said paragraph is a condition precedent to the right of the contractor to receive additional compensation. No contention is made by the petitioner that it complied with the provisions cited and there is no evidence to that effect. The trial court has specifically found that these provisions were not complied with. (R. pp. 27, 30.)

Provisions similar to those contained in paragraph D of the contract as to the method of handling extras have been passed upon in numerous instances by the courts, and it seems to be well settled that they are valid and binding upon the parties in the absence of a waiver, modification or abrogation thereof.

O'Keefe *v.* St. Francis's Church, 59 Conn. 551, pp. 560 and 561;
66 A. L. R. Annotation pp. 651, 652.

It is undoubtedly also well settled that such a provision can be waived by parol, but the evidence of such waiver must be clear and of a most satisfactory character.

O'Keefe *v.* St. Francis's Church supra;
Sanford & Brooks *v.* United States, 267 U. S. 455, 457;
Caldwell *v.* Schmulbach, 175 Fed. 429;
Reilly Company *v.* Smith, 177 Fed. 168.

The petitioner sought to escape the application of the provisions of paragraph D by asserting that its president, Mr.

Ciraci, claimed orally to the respondent's engineer that the various items for which it now claims extra compensation were in fact extras and that the respondent's engineer orally promised that if they were extras they would be paid for as such upon the completion of the work. (Testimony pp. 482, 483) There was a sharp conflict in testimony between Mr. Ciraci, testifying for the petitioner, and Mr. Brewer, testifying for the respondent, as to what took place in that connection. (Testimony pp. 869, 870, 871, 888, 884) The trial court has found in favor of respondent as to this fact. (R. pp. 28, 46)

That the respondent followed out the provisions of this paragraph in ordering extra work done by the contractor is indicated by the fact that in at least four instances, where the respondent recognized that it was calling upon the contractor to do work not covered under the contract, it wrote letters to the contractor specifying exactly what work was to be done and exactly how the contractor was to be compensated for that work. (Testimony pp. 885-888) These letters appear as Exhibits 5, 6, 7 and 8 and range in dates from August 12, 1937 to May 7, 1938. In one instance at least (Exhibit 7) the contractor was requested to name a definite price for the work and was ordered to do it in accordance with that price. Mr. Brewer, the respondent's engineer in charge of the work, stated (Testimony, p. 885) that one other order for an extra was given orally to the petitioner because it was a small matter and had to be done quickly. Confirmation by letter was apparently overlooked. But with that one exception all work recognized by the respondent's engineers as extra work was covered by a written order under which the work was done by the petitioner. Mr. Buck, testifying for the petitioner, stated that it was good engineering practice to order extras in writing. (Testimony pp. 822, 823)

The petitioner sought to discount the importance of these written orders for extras on the ground that they were all small matters involving no large amounts of money. That is probably true but they serve to substantiate the respondent's contention that even in the case of such small extras it rigidly adhered to the provisions of the contract as to written orders.

Surely, its engineers would not have been so meticulous in small matters and have obligated the respondent to any such substantial payments as the petitioner now seeks on construction work, which, according to the petitioner's claims, made the contract an entirely different one from that into which the parties entered.

Mr. Kilby, one of respondent's inspectors, testified that, where an extra is ordered, the inspector on the job is required to check the time and materials which go into that extra and compare the results with the petitioner's foreman, to be sure that they are in agreement on the details so that there will be no dispute when the time comes for payment. (Testimony pp. 1099, 1100) This was done even on all of the extras which involved comparatively small amounts and on any such substantial claims as those presented here the respondent's inspectors would have been extremely careful to check labor and materials in detail as the work was going on. They did keep a daily record on every part of the work as to just what was done, but they had no opportunity to compare that record as to any item of petitioner's alleged extras with the petitioner's foreman, and the petitioner sought to have the trial court disregard the evidence of the respondent's records and take the unrecorded recollection of Mr. Ciraci in its place. The petitioner did not and cannot dispute the accuracy of those records, which were made in the regular course of work and not in contemplation of any law suit, but it contended that the costs of various parts of the work, claimed to be extras, which the respondent prepared from these records do not show the real cost of these items to the petitioner and should not be considered by the trial court.

Although the plaintiff notified the respondent in its letter of February 5, 1938 (Exhibit EE) that it intended to make a claim for extras, it was not until ten months later, in December of that year, that the detailed claim was filed. (Ex. 13; Testimony pp. 964-966) The petitioner attempted to make some point of fact that the respondent did not ask for an itemized statement. Certainly, if the petitioner filed the itemized statement as soon as it could, as stated in its letter (Ex. EE), it

would have done the respondent no good to have made a request for it at any earlier time, as it could not have been produced. More than that, all of the work covered by the claim, except the comparatively little which was done after February 5, 1938, had been completed and it would have been impossible for the respondent to have secured any more information than it had from its own records as to the details of such work. In preparing this itemized claim the petitioner brought in an outside engineer, Mr. Buck, who knew nothing whatever about the job itself, because it had been entirely completed at the time his services were obtained, and he himself testified he made the claim up from such records as the petitioner gave him and also from Mr. Ciraci's recollection of what occurred. (Testimony, pp. 782, 795, 796, 814) In other words, it was a statement made up from sources of information that could not be verified by the respondent by physical examination of those sources as the one day-by-day record alleged to have been kept by the petitioner was Mr. Ciraci's diary, the greater part of which was never produced for the inspection of the trial court or the respondent. (Testimony pp. 292-294) At best, Mr. Buck could make up the details of the claim only from what was told him so that he acted not as a consulting engineer but as a cost analyst. The court's attention is directed to the fact that the original itemized claim (Ex. 13) and the testimony of Mr. Ciraci, reduced to writing as Exhibit H, while purporting to cover exactly the same claims, do not agree in their figures, and the claims now made are in the aggregate substantially above what were originally presented to the respondent as Exhibit 13 totals only $56,202.92 as against $68,632.22 shown by Exhibit H. Mr. Buck testified that Exhibit H was not his computation but an attempt on his part to put on paper what Mr. Ciraci in effect dictated to him. He acted merely as Mr. Ciraci's clerical assistant in that regard. (Testimony p. 783)

Certainly the testimony of Mr. Ciraci, flatly contradicted as it was by that of Mr. Brewer and negatived also by the actual practice adhered to by respondent's engineer in ordering extras in writing, was insufficient to prove the alleged waiver

of this provision by the respondent. And no act of any of the respondent's representatives was testified to which would strengthen the petitioner's contention in this regard.

The finding of the trial court, that the condition precedent to the presenting of claims for extras has not been complied with and that the requirements of the contract were not waived by the respondent, is strongly supported by the evidence.

CLAIM NO. 1. PREFORMED CRADLE.

One of the largest of the petitioner's claims is based on what has been called preformed cradle construction, which was ordered by the respondent's engineer in four sections of the work. The purpose of this construction, as testified by the respondent's engineer, was to prevent the heavy sewer pipe from sinking into the soft ground and, according to his testimoney, it was contemplated at the time the contract was let that this type of construction might have to be used. (Testimony, pp. 874, 875, 939, 942, 950) The petitioner's contention seems to be that nowhere in the contract or specifications or accompanying plans was the type of construction known as preformed cradle described and that it had no notice that this type of construction would be used.

On the contract plan, Exhibit C, appear cross-sections of all three types of reinforced concrete pipe construction known as type A, type B-1, type B-2 and type C. It is the claim of the respondent that the type of construction known as preformed cradle is type C as delineated on this plan, and, although this type of construction is not described in detail in the contract specifications, those specifications, (Ex. A, p. 40, par. 2) provide that plans, proposal, contract and specifications are intended to be cooperative, and all works necessary to the completion of the contract shown on plans but not described therein, and all works described therein but not shown on the plans are to be considered as having been properly described. The plan referred to indicates that type C is an entirely different type of construction from either type A or types B-1

and B-2. It is evident even to a layman that no planks and sills are shown in type C and that the indication is of some formed foundation on which the sewer pipe rests. The respondent contends that this concrete foundation cannot be installed unless it is preformed, that is, unless it is allowed to assume a permanent shape and to acquire some strength by waiting before the pipe is placed on it, a process which is known as curing. It is the further contention of the respondent that this cradle must be preformed if reinforcing steel is used, as it was, because otherwise the steel could not be placed in its proper position on account of the sills. It is the respondent's contention that type C construction could be ordered with or without a pile foundation underneath and, in fact, no such pile foundation was ordered in any section of the work. The respondent's engineer testified that this was a much stronger type of construction than either type A or type B and was indicated in this particular contract wherever the ground was of such a nature as to be so soft or unstable as not to support the weight of the sewer pipe until the concrete had set sufficiently to spread the load upon the bottom of the trench and prevent undue settlement. (Testimony pp. 874, 875, 951) It was, in fact, ordered in one section after type B construction failed to hold the weight of the pipe, which sank below grade. (Testimony, pp. 874, 944, 1083, 1084, 1117)

Mr. Ciraci testified that he had never seen this type of construction before (Testimony p. 459) and from this it would appear that his failure to understand how this foundation was to be constructed, as provided by the contract, was due to lack of acquaintance with this type of construction and that he was not justified in assuming that it was to be installed in the way that he claims the plans indicated. As the petitioner's sewer operations had been confined largely to Ohio except for one contract in Pennsylvania, Mr. Ciraci's lack of knowledge was understandable.

The contract plans, of which Exhibit C is a part, were made available to all parties, including the petitioner, before the contract was let. Before the petitioner actually began operations under the contract, the respondent's engineer sub-

mitted to Mr. Ciraci a blue print showing the details of this cradle, dated June 30, 1937 and in evidence in this case as Exhibit F. (Testimony p. 870) These details differ in no respect from the section shown on Exhibit C except that there is a notation that ½" between the bed of the cradle and the outer surface of the sewer pipe is to be grouted. Although Mr. Ciraci testified that he had told Mr. Brewer, the respondent's engineer, that the entire preformed cradle construction was outside the contract provisions, Mr. Brewer testified that the only objection Mr. Ciraci ever made to this type of construction was this grouting which Mr. Ciraci pointed out had not been definitely shown on Exhibit C and concerning which he was not informed until Exhibit F was presented to him. (Testimony p. 870) Realizing that this might prove to be an added expense to the petitioner, Mr. Brewer included in the final estimate for the work an amount to cover the cost of the concrete used in this grouting, as he had in earlier contracts. (Testimony, pp. 871, 884) The petitioner, recognizing that the claim on this item is a very substantial one to be made without having a written order to support it, sought to bolster its claim that it was ordered as an extra by the respondent, by stating that the detailed blueprint sketches hereinabove referred to, and which were delivered to Mr. Ciraci before any cradle work was done, were in fact orders in writing which satisfied the requirements of the contract in that regard.

The decisions hold that, *where an extra is ordered,* a detailed blueprint such as these in question may take the place of a written order.

See 66 A. L. R. Ann. p. 660, par. b.

Such blueprints are never to be construed to be orders in writing where the owner or his representative did not give them with that intention. In other words, if they were given, as the respondent in this case contends, as illustrative of contract drawings already made and in the possession of the petitioner, it would be twisting the facts beyond reason to hold that such blueprints were orders for extra work. Their similarity to the original contract blueprints is such that they cannot fairly be

construed as written orders for extra work and the trial court was of that opinion. (R. p. 30)

The contract, Exhibit A, specifically provides, on page 31 under paragraph P, that the general features of the work are shown on the drawings referred to in the proposal which are made a part of the contract and the respondent's manager under that provision has the right and duty to furnish the contractor with such additional plans as may be necessary to show the details of construction which may be considered as illustrating the requirements set forth in the contract and specifications. While undoubtedly the respondent could not require the petitioner to do work shown on additional plans prepared by its engineers which bore no relation to the original plans and specifications, nevertheless the details of the concrete cradle shown on Exhibit F certainly do not vary in any major particular from the drawing shown on Exhibit C. As a matter of fact, the grout seems to be the only additional feature aside from the indication of the dimensions of cradle itself to be used in connection with the various sizes of sewer pipe. The plan (Ex. C) provided that dimensions of cradle would be as designated by the engineer. Exhibit D, another sheet of the contract plans, shows this same type C construction where the pipe is placed on, or very nearly on, the surface of the ground. The cradle in such instances would have to be preformed, as it rests on the surface of the ground with no trench. (R. p. 32; Testimony p. 882)

Mr. Brewer, the engineer in charge of this work for the respondent, testified that this same type of preformed cradle construction had been used in contract No. 2 in 1934 and in contracts Nos. 11 and 14 in 1935. (Testimony, p. 872) These contracts were parts of the same sewerage project as the present contract No. 18. Mr. Brewer further testified that in none of these contracts had there been any claim of the contractor that this type of construction involved extra payment. (Testimony, p. 872) In the case of the present sewer, Mr. Brewer testified, the respondent's engineers expected, because of its location in the river valley, to have to use this type of construction, although they could not tell in advance exactly

how long the sections would have to be in the various locations. The borings shown on the contract plans (Exhibit B) indicated in several places "sandy loam", "ash fill", "fine sand" and "soft clay". It would naturally be impossible to tell until the trench was opened up to some extent or test pits dug how unstable the bottom would be and whether or not type C construction would be needed. (Testimony pp. 881-883) This the petitioner must have known would be the situation when the contract was let. As a matter of actual fact, the respondent's witnesses testified that south of crossing No. 3 over the Clark property, between crossings Nos. 1 and 2 on the Seminary property and north of crossing No. 2 on the Jacobus property, orders for type C were given at the very start of such sections. (Testimony p. 883) And Exhibit D, as stated above, shows that this construction was *not* an afterthought.

It did not appear that the method of constructing the preformed cradle ordered by the respondent differed in any material respect from type C as indicated on the drawings and the petitioner's chief complaint was that there was an unnecessary delay in the time required for curing the concrete. It is alleged in the complaint that the respondent required the preformed cradle to be cured for a period of from three to seven days before the sewer pipe could be laid upon it, and Mr. Ciraci testified that as many as seven days were required in several instances. With the purpose of meeting the petitioner's testimony in this regard the respondent prepared, from day to day diaries kept by its inspectors, a chart showing the periods of the pouring of the cradle and the laying of the pipes covering the entire sewer construction work. In addition to this chart, which appears as Exhibit 14, excerpts have been made from the diaries mentioned covering every foot of the preformed concrete cradle work done on the job. These appear as one exhibit, No. 24, and from this exhibit it can be fairly easily determined that in no instance did a period of as much as seven days elapse in any part of the work between the pouring of the cradle and the laying of the pipe, except where weather conditions, holidays, Sundays, etc. intervened. The average is certainly not more than four days and in many in-

stances less, even in the summertime when high-early cement was not used. (Testimony of Mr. Kilby, pp. 1072-1082)

The diaries kept by the respondent's inspectors are very complete and indicate for each day of the contract period exactly what was going on. It does not appear from these diaries that there were any idle days, except as a result of weather conditions (See Ex. 30), and it would seem, therefore, that the petitioner's men were otherwise employed during the period when the cradle was curing. No diary was kept by Mr. Ciraci or by anyone on behalf of the petitioner indicating day by day exactly what was being done by the various gangs of workmen. Mr. Ciraci was drawing entirely upon his memory as to how long a time elapsed between the pouring of the cradle and the laying of the pipe on it, and such testimony is certainly not dependable in view of the exact evidence which the respondent produced showing the progress of the work day by day.

The trial court has accepted the testimony of respondent's witnesses as to what took place with regard to the preformed cradle work, has found the petitioner's testimony in that regard unsatisfactory and has definitely found the item of claim unproven. (R. pp. 35, 46) This finding is supported by substantial evidence, as indicated in the foregoing discussion of what was before the trial court.

CLAIM NO. 2. EXTRA PUMPING

This is a claim for extra expense incurred by petitioner due to the necessity of pumping ground water as the construction of the sewer progressed. This claim is based on the alleged fact that the plans (Exhibit B) erroneously showed an existing sewer at the lower end of contract No. 18, and the petitioner, in making up its bid, contemplated that it would be allowed to connect with the sewer shown so that the ground water would flow away through the completed pipe. The plan in question shows, south of Farmington Avenue at the southerly end of the sewer to be constructed under contract 18, two

parallel broken lines with no designation whatever as to what they represent. Mr. Ciraci, acting for the petitioner, had a set of plans and testified that he examined the site of the work before he prepared his bid. (Testimony, pp. 328, 329) He made no inquiries whatever of any representative of the respondent as to whether there was an existing sewer at that point, (Testimony p. 365) although he knew, and in fact it was stated on page 40 of Exhibit A, that the work to be done under contract 18 was but a part of a larger project, and that the contractor must cooperate with other contractors for other parts where the work provided for in contract 18 adjoined other work. If it was so important to the petitioner to have this supposed existing sewer as an outlet, it was incumbent upon Mr. Ciraci to make certain that it was in fact in existence and not make an assumption which was entirely unwarranted from the information which he had.

It appeared from the testimony of Mr. Brewer that in fact the intercepting sewer referred to was not in existence but was under construction as a part of contract No. 16, which was let about two months before contract No. 18 and which could not possibly have been completed until many weeks after the petitioner began its work, as No. 16 started about a mile south of No. 18. The completion date for No. 16 was December 1, 1937 and that for No. 18, December 31, 1937. (Testimony p. 861) If Mr. Ciraci had looked further on Exhibit B he would have noted in the upper left hand corner, in the detailed section, a line labelled, "Beginning of this contract Sta. 49+89.00, End of contract 16." It would have taken very little effort on his part to have ascertained before he prepared his bid that he would have no outlet at the southerly end of his contract for the drainage of ground water. He did in fact know as early as May 26th, the day after bids were filed, before he left Hartford to go to Cleveland and before the award was made, that there was no outlet, and yet in his letter of May 29th, written to the respondent from Cleveland, in which he was required to give an outline of his schedule of operations under the contract, appears no statement that the petitioner would have to change its plan because of the

absence of the outlet which Mr. Ciraci now claims was shown on the contract drawings. (Testimony, pp. 372, 384, 385, 386) Moreover, Mr. Brewer, testified that even if the supposed sewer had been completed, the petitioner would not have been allowed to connect up to it and pass the ground water through it, as it would have been in use for sewage purposes and would have created a foul condition. (Testimony p. 890) Mr. Brewer also testified that the grade of the sewer being built by the petitioner was so flat that ground water would not have been drained rapidly enough through it into No. 16 to have been of any use to the petitioner. (Testimony p. 889) Even if the sewer outlet had been in existence, petitioner would have had to find out about its size and height or it would have been of no advantage to its work. (Testimony p. 916)

There is certainly nothing in the contract justifying the petitioner in its belief, and the respondent contends that this claim is entirely untenable. Indeed, the contract provides (Ex. A, page 50, paragraph 29) that the contractor shall provide all necessary pumps for excluding and removing water from trenches, tunnels and other parts of the work, and he shall satisfactorily remove the water. Compensation for such pumping was to be considered as included in the prices stipulated for the appropriate items as set forth in the paragraph mentioned and also in paragraph N (3) on page 28. Ample notice was, therefore, given to the petitioner of what it was required to do in the way of taking care of ground water. Mr. Brewer stated that the petitioner did only the normal amount of pumping of ground water for such a job as this. (Testimony, pp. 921, 922, 936-938)

CLAIM NO. 3. UNDERGROUND STRUCTURES IN WOODSIDE CIRCLE AND REPAVEMENT OF STREET.

The petitioner has made claims for extra compensation because it encountered various structures beneath the surface of the ground in and near Woodside Circle north of Asylum Avenue. These were: (1) a gas pipe which, while shown on

the plans, the petitioner claims was not located in the position indicated; (2) the stone foundation of an old house which was not shown on the plans because its existence was unknown to either of the parties; and (3) a water main which, while shown on the plans as crossing the line of the sewer trench, the petitioner claims was found in a different location and one which necessitated the digging of a wider trench and supporting the water pipe.

Underground structures in general are covered by the provisions of the contract. On page 28 of Exhibit A under subparagraph (3) of paragraph N, it is stated that the bid prices include full compensation for removing or protecting without cost to the District all pipes, mains, drains, sewers, conduits or other obstacles whether shown on the plans or not. And, again, on page 49 appears the provision that the contractor shall without expense to the District do everything necessary to support, protect and maintain all pipes, conduits, sewers, drains or fixtures of all kinds lawfully in the line of excavation or adjacent thereto or other structures which may be damaged by the work to be done under the contract. Furthermore, the plan (Ex. C) bears a note as follows: "The indication of pipes, soils and underground objects hereon are supposed to be approximately correct, but, should they be found otherwise, the contractor shall have no claim on that account, it being expressly understood that the party of the first part does not warrant the plot to be even approximately correct." Apart from the contract provisions and the notation quoted, it appeared from the evidence that the gas pipe was found in approximately the location indicated on the plan (Ex. C). (Testimony, pp. 957, 1019) An examination of the plan shows that the gas pipe, which appears just southerly of station 81+02.65, is within the limits of the sewer trench, for the broken lines designated on the plan as 6" gas are practically in the same line as the outer surface of the sewer pipe indicated on the plans and, of course, the trench had to be excavated wider than the diameter of the pipe, which would bring the gas pipe within the sewer trench. The evidence shows that this pipe, instead of being on the easterly side of the trench,

was actually on the westerly side and the petitioner made a request, to which the respondent acceded by a letter dated December 3, 1937 (Ex. 19), as the result of which the line of the sewer was moved one foot nearer the easterly curb of Woodside Circle so as to make this work easier for the petitioner. (Ex. 19; Testimony, pp. 1002, 1003) At that time no request was made by the petitioner for extra compensation and no written order was issued by the respondent that the work was to be done as an extra. It appeared in evidence that the information shown on the plans had been obtained by the respondent's engineer from the Hartford Gas Company, owner of the pipe, and was the best information obtainable from any source. The respondent itself had no independent knowledge as to the location of the gas pipe. (Testimony, p. 897) In view of the contract provisions and the pertinent facts as to the location of the gas main, this claim of the petitioner would seem to be entirely unfounded.

The existence of the old stone house foundation as encountered by the petitioner was entirely unknown to both parties, and, so far as appeared from the evidence, could not have been ascertained in advance by either of them. The provisions of the contract cited fully covered this situation, and the petitioner at the time of signing the contract was apparently entirely willing to accept its conditions. If, therefore, it is allowed to recover extra compensation for the removal of this foundation, the burden is shifted from the petitioner, which assumed it, to the respondent municipal corporation which sought to protect its taxpayers against just such a contingency.

The water main, for the support of which the petitioner claims extra compensation, is shown on the plan (Ex. C) crossing the line of the sewer on Woodside Circle approximately west of the house marked 24 on the plan. The complaint of the petitioner seems to be that, although it expected to encounter this water main in its excavation work, the pipe actually continued within the limits of the trench for a greater distance than the plans showed. The respondent submits that on plans of this kind accuracy to the last detail in such a mat-

ter as this is not feasible, and the petitioner should have made allowances, in submitting its bid, for such a contingency as this. As a matter of fact one of the respondent's engineers testified that, although he did not see the pipe in the trench, he was familiar with the work that had been done in supporting this pipe and was satisfied that not more than thirty-five to fifty feet of the pipe were within the limits of the trench and that the supports used had been paid for. (Testimony, pp. 1003, 1004) Part of the petitioner's claim is the cost of this support in spite of the fact that the provisions of the contract on page 49 require this as a part of the bid price.

A further claim appearing in Exhibit H is for extra compensation for the construction of concrete foundations under existing sewer pipes at the northerly end of Woodside Circle. This situation is also covered by paragraph 28 appearing on page 49 of the contract, and the petitioner admits this but claims that the item under which the foundations were paid for could not be interpreted to cover formed concrete of the kind used in these supports. Mr. Ciraci testified that the foundation piers used to support pipes in this way must be prepared by the use of forms and that the total amount of concrete used was paid for. (Testimony, pp. 492-494) The forms were not to be paid for separately and it would seem that this claim has no basis in fact.

The respondent submits that none of the above extra should be allowed under all the circumstances and for the further reason that the petitioner at no time made any claim in writing to the respondent at the time the work was done. If they constituted extras under the contract, the contract provisions covering them should have been complied with by it.

In the case of *Tompkins, Inc. v. Bridgeport*, 100 Conn. 147, the blueprint furnished to the contractor purported to indicate the existence of all sewers, pipes and other structures under the earth surface which might affect the carrying out of the work and the location and extent and condition of certain sewers. It further appeared that twenty completed pipes and other structures not shown on the blueprint existed

and affected the carrying out of the work. The court said, on pages 153-154:

> "The Exhibit (referring to the blueprint) may fairly be taken to be an authoritative representation by the defendant city as to the existence and location of its own public sewers. It does not, however, purport to be an authoritative representation as to the existence, or nonexistence, or location, of any other underground structures which might affect the progress of the work. As to such structures the contractors were informed by the Exhibit that the city assumed no responsibility for errors in location. * * * * * The net result is that it appears from the complaint that the Exhibit—as far as it purported to be authoritative—was in the main correct, but was misleading in that some public sewers encountered in the progress of the work were not shown, and in that one sewer marked 'dead' had flow in it." (parenthetical phrase supplied)

The municipality was not held responsible for the location of underground structures with the placing of which it had nothing to do.

The petitioner claims that the respondent required it to repave certain portions of Woodside Circle from curb to curb, although the plans and specifications indicated that the petitioner should renew only such portions of the pavement as were damaged by the sewer operations. Here again the contract (Ex. A) provides fully for the repair of street pavement. On page 29 in paragraph N (3) the bid prices are to include full compensation "for replacing, repairing and maintaining the surface of the street or private land if affected by work performed under this contract." On page 52 of the contract, in paragraph 38, it is provided that the contractor must conform to the customs and requirements of the state, town or city highway or street department as to making cuts in and repairs to such pavements. And in the same paragraph, on page 53, the contractor is required, when the fill has settled and before the end of the maintenance period, to repair permanently in a manner satisfactory to the engineer and to the proper state, town or city official, and restore to a condition as nearly like as possible to the condition of the roadway before the sewer

work was started all cuts and settled or damaged areas in pavements, sidewalks, curbs, gutter and street fixtures occasioned by work under the contract. And the contract is not to be considered as completed until repairs and restoration of damages have been permanently completed.

The respondent's evidence showed that throughout most of the length of the Woodside Circle the area where settlement had taken place and where new pavement was required to be installed by the petitioner included a strip from the easterly curb to the center of the street but that no greater area than necessary was required to be repaired and that in no case was the full width of the street resurfaced. It is apparent that, where excavation has been made in a highway, more than the exact area of the trench must be renewed as there is bound to be some settlement at the edges. (Testimony, pp. 999-1001; Exhibits 15, 16, 17)

The photographs introduced in evidence by the respondent (Exhibits 15, 16, 17 and 18) plainly show the portion between the easterly curb and the approximate center of the street which was required to be repaved by the petitioner. In no case do these photographs show that the entire width of the street was repaved. If the petitioner at the time of this repaving considered that it was being required to do extra work under the contract it would have been a very simple matter to have made a written claim for it to the respondent and to have shown by actual photographs just what part of the Woodside Circle pavement had been renewed. There is no foundation for this claim and the trial court has so found.

CLAIM NO. 4. ADDITIONAL STONE FOUNDATION

The petitioner claims that at the four river crossings and at certain other locations it was required to place broken stone in accordance with requirements of the contract (Par. 16, p. 46) and it alleges in certain instances the respondent paid on the basis of a 2″ stone foundation, whereas the petitioner had to put in a 4″ foundation, as the bottom 2 inches worked

into the soil. It will be noted that paragraph 16 referred to provides that whenever the ground encountered is soft and unsuitable for foundation, it shall be removed and replaced by crushed stone, plank or concrete, laid as may be ordered, and that payment for such foundation as placed shall be either per cubic yard of crushed stone or per board foot of lumber, or per cubic yard of concrete actually ordered and used in the trench. The respondent claims that only 2 inches of stone was ordered in trenches and that no more was placed. As to the stone used in the river crossings, the claim set out in Exhibit 13 figures 10′ wide by 6′ 2″ high against 11′ by 5.2′ actually paid for by the respondent.

The amount involved in this claim is small but it would appear that the petitioner is attempting to secure payment for all of the crushed stone used on the job, whereas it was required to use such material in roadways and other places in the construction of the job, which was not to be paid for by the respondent as a specific item. (Testimony, pp. 1008, 1009)

CLAIM NO. 5. TESTING RIVER CROSSINGS.

It was admitted by all the witnesses that the leakage tests should have been made when the river crossings were completed and before the sheeting had been drawn and the work backfilled and the river allowed to flow over the pipe. (Testimony, pp. 779, 896, 1132) The petitioner claims that it was the fault of the respondent that the leakage tests were not made at the proper time.

There was a sharp conflict of testimony between Mr. Ciraci and the respondent's witnesses, Mr. Root, Mr. Kilby and Mr. Brewer, as to what actually took place with regard to the testing of the river crossings. The No. 4 river crossing was tested when it was completed and no question is raised about that. Mr. Kilby testified that he asked Mr. Ciraci if he was not going to test river crossing No. 3 when it was completed and that Mr. Ciraci told him that Mr. Brewer had said it would not be necessary to test any of the river crossings. Mr. Kilby

then attempted to get in touch with Mr. Brewer without success and later spoke to Mr. Root on the job and asked him if no test of the river crossings was to be required. (Testimony, pp. 1095, 1096, 1034, 1130, 1131) Mr. Root said he had had no instructions from Mr. Brewer not to require a leakage test and so far as his instructions went the provisions of the contract were to be enforced. (Testimony, p. 1034) Mr. Ciraci, however, completed river crossings Nos. 1, 2 and 3, backfilled the same and withdrew the sheeting without making leakage tests. Later, Mr. Brewer insisted upon such tests and they were carried out, but due to the difficulty of making such tests and stopping leaks from the inside the results were very unsatisfactory and the work long drawn out. (Testimony pp. 895, 896) The petitioner now claims not only that the respondent's engineer and inspectors were responsible for the failure to test at the proper time, but also that the type of construction provided by the specifications was such that the joints could not be made tight as there was bound to be settling which would open up the joints. The petitioner was shortsighted in not testing the crossings upon completion, as, if the tests had been made while the crossings were still dry, there would have been no chance for the pipes to settle and the petitioner would have had a considerable advantage thereby, as, once the crossings had passed the leakage test, it could not have been held responsible for any later leakage. It is practically impossible to detect the location of leaks from the inside of the pipe and to caulk them satisfactorily, as both respondent's engineer and Mr. Buck agreed. (Testimony, pp. 779, 895) This must have been as well known to the petitioner as to the respondent. Even though the last river crossing was completed on November 12, 1937 and the testing of the No. 3 river crossing was not started until March, 1938, one line of pipe in No. 1 crossing passed the test, one line in No. 2 crossing passed the test and No. 3 passed the test complete. (Ex. DD; Testimony, pp. 508-514) This would seem to refute the petitioner's contention that the construction of the river crossings was such that they could not be made reasonably tight and indicates that the result might have been satisfactory on

all lines if the test had been made while the pipes were still uncovered. Even Mr. Ciraci thought so. (Testimony, p. 522) As the petitioner abandoned the work in March 1938, the respondent was compelled to have the crossings made tight by another contractor in accordance with the provisions of the contract. The petitioner has included in its extra claim for this testing not only the charges of the sub-contractor but 15% overhead and profit thereon, as it has in the other instances mentioned.

It seems extremely improbable that the respondent's inspectors on the work would have assumed to dispense with the requirement of the contract for the testing of the river crossings without authorization from the respondent's engineer, and Mr. Brewer has denied that he ever gave instructions to waive such tests. (Testimony, p. 895) Moreover, Mr. Kilby's testimony differs from Mr. Ciraci's, in that the former states that Mr. Ciraci told him that Mr. Brewer had waived the leakage test, whereas, Mr. Ciraci testified that Mr. Kilby waived the leakage test. The trial court has accepted the testimony of respondent's witnesses as to this claim.

CLAIM NO. 6. RELAYING PRIVATE DRAIN.

On the Veeder property, just south of Asylum Street, petitioner encountered a 6″ drain which had apparently been placed underground by the property owner to drain the water from his land. The respondent had no knowledge of the existence of this drain and naturally could not show it on the contract plans. It claims that this drain also, as an underground structure, was covered by the provisions of paragraph N (3) on page 28 of the contract, of paragraph 29 on page 50 and also by the notation made on the contract plans. It appears that no claim for this as an extra was made by the petitioner at any time until it filed Exhibit 13 sometime in December, 1938. As having a bearing on this particular alleged extra, the Court's attention is directed to the petitioner's claim for pumping sewage on the Day property, appearing on page 39 of Exhibit H.

The cost of by-passing that sewer to the river was paid for by respondent as an extra and that extra was covered by a letter from respondent (Exhibit 6) in accordance with the contract. (Testimony, p. 887)

CLAIM NO. 7. ADDITIONAL SHEETING.

Petitioner makes claim for $575 for 115,000 board feet of lumber at the bid price of $5 per thousand, claiming that this was lumber not paid for by the respondent but which could not be taken out with safety to existing structures and that the respondent enjoyed the benefits thereof. The contract provides in paragraph 14 on page 45 that the respondent's engineer will order sheeting and timbering left in the ground when, in his opinion, it may be necessary to protect the work under construction; and, in paragraph 15 on page 46, that when sheeting is ordered left in it shall be placed, cut and removed in such parts and amounts and at such points as the engineer shall order, and that the contractor shall receive as full compensation the price named in the proposal per foot board measure for the lumber actually left in the ground, except that when any sheeting plank is cut as ordered and the end removed is not over 3′ long the whole of said plank shall be paid for. All the sheeting ordered left in was paid for. (Testimony, p. 1006) In Exhibit H, on page 36, it appears that the contractor left in a total of 189,000 board feet of lumber at points where *in his judgment* its removal would endanger the new sewer and adjacent structures and pavements, whereas, the respondent paid for only 73.7 thousand board feet of lumber claiming that the remainder was not ordered to be left in place. The petitioner concedes that the respondent's engineer did not order the extra sheeting left in, but it seeks to substitute its judgment for that of the engineer, in spite of the fact that the contract provides that the engineer shall be the judge. (Testimony, p. 529)

The case of *Tompkins, Inc. v. Bridgeport*, supra, covers this very point of sheeting left in place throughout the work.

In that case the contractor claimed that good engineering practice required all of the sheeting to be left in place throughout the work. The contract provided that when the engineer decided that sheeting or shoring could not be removed without injury to the sewers or adjoining structures it should be cut where designated by the engineer and the upper part removed. The court said, at page 158:

> "The parties expressly agreed on a rule for determining whether the sheathing should be removed or left in place, which rule covered the whole subject-matter. The sheathing was to be removed unless the engineer otherwise decided for cause, and then it was to be left in place. That being the express agreement of the parties, the law will not sweep it aside and substitute an implied agreement to follow a different rule which would, in effect, substitute the judgment of a trier for the judgment of the engineer. The engineer must follow his honest judgment; and there is no allegation that he has not done so."

We have this exact situation in the present case and the respondent submits that its engineer's honest judgment should prevail.

CLAIM NO. 8. ADDITIONAL REINFORCING STEEL.

This is a small item but shows the attitude of the petitioner in attempting to secure payment for all reinforcing steel used by it even though the contract provided that all reinforcing steel should not be paid for separately from the structures of which it was a part. Paragraph 49 on page 56 of the contract provides that all reinforcing steel shown on plans as part of any structure, unless indicated otherwise, is included in the price bid for that structure. The petitioner seeks to nullify this provision by claiming that item 16 on page 81 of the contract requires the respondent to pay for reinforcing steel in all special structures and that this is in conflict with paragraph 49, and that it is therefore entitled to payment for all reinforcing steel used by it. (Testimony, p. 533) The peti-

tioner produced no evidence to show where the steel not paid for was used (Testimony, p. 529) and at no time made claim for the steel as an extra until it filed with the respondent its original claim (Ex. 13) in December 1938. The respondent submits that not only is this claim without foundation but that the petitioner is estopped by its failure to comply with the terms of the contract as to the filing of claims for extras. (Testimony, p. 1006)

CLAIM NO. 9. BUILDING BULKHEAD IN 27″ SEWER AND BREAKING OUT SAID SEWER.

This claim is for extra payment on account of the work which petitioner did in blocking off the existing 27″ sewer where the line of the new sewer joined the line of the old. The 27″ sewer was an active sewer and, as shown on the contract plan (Ex. B) in the upper left-hand corner, would have to be blocked off when the new sewer construction reached the point where it followed the line of the old sewer. The plan referred to shows a bulkhead in the old sewer with a notation "Build 8″ brick bulkhead in the present 27″ sewer". It gives no definite location for this bulkhead but its very evident purpose is to shut off the flow in the old sewer. Mr. Kilby, the respondent's inspector on the job, testified that the proper procedure was for the petitioner to block off the flow in the old sewer by a temporary bulkhead until the new sewer was constructed, when a permanent bulkhead should have been placed in the old sewer. (Testimony, pp. 1089-1095) Apparently the petitioner selected a location in the old sewer for the bulkhead which was too near the line of the new sewer and which had to be broken out when the new sewer was built. The trial court has accepted Mr. Kilby's testimony as to the facts. (R. p. 39)

This claim as to the rebuilding of the bulkhead in the old sewer and the claim as to the breaking out of that same sewer because of its proximity to the new sewer are treated together in petitioner's Exhibit H on page 38. They are, however, separate matters. On the same contract plan (Ex. B), about mid-

way of the plan near the bottom, is shown the elevation plan of the new sewer and the old 27″ sewer. The inside line of the old sewer is shown practically on top of the line of the new sewer, so that the contractor was clearly informed that it would be impracticable to attempt to excavate for the new sewer while the old sewer was in place. Moreover, the original diameter of the new sewer was 51″, but at its own request the petitioner was allowed to substitute brick for concrete in building the new sewer at that point which increased the diameter of the new sewer by several inches and caused further interference with the line of the old sewer. (Testimony, p. 544) The contractor therefore knew that it could not possibly install a new sewer without breaking out the old. It was clearly due to the petitioner's own error in reading the plans if it figured that it would not have to disturb the old sewer at this point. It certainly cannot claim that the plans were inaccurate in this particular as they proved to be exactly correct when the petitioner came to construct the new sewer at that point. Petitioner's own engineer, Mr. Buck, testified that while it might be expected that the plans would show the outside of the existing sewer and not the inside, by scaling the plan you can see that the inside line of the old sewer was indicated. (Testimony, pp. 810, 811) Apparently Mr. Ciraci did this scaling with regard to the location of the bulkhead in this same existing sewer for which petitioner is now making claim for extra payment, because his claim is based partly at least on the fact that the plan (Ex. B) shows the bulkhead at a point where its construction was not satisfactory to stop the flow of sewage. The petitioner insists that it has a right to rely on the accuracy of the plans when it serves its purpose but refuses to allow the respondent to rely upon them when the result is unfavorable to the petitioner.

The claim presented by the petitioner on page 38 of Exhibit H is a joint claim and it is therefore impossible to determine which part of the claim applies to the plugging of the old sewer and which applies to breaking it out to remove it from the line of the new sewer. Moreover, the petitioner at no time indicated to the respondent that it expected to be paid as an

extra for either part of this work and the respondent contends that there was no reason why this should not have been handled as an extra by the petitioner if it expected to make such a claim.

CLAIM NO. 10. PRIVATE HOUSE SEWER ON DAY PROPERTY.

This claim appears to be based on the fact that although the petitioner diverted the flow from the existing sewer to the river before breaking out the existing sewer, which was at that point in the line of the new sewer, sewage continued to flow into the new construction work from some point to the south of the main sewer. The petitioner claims that it was necessary to pump this sewage for 25 working days before the source of the sewage was found and by-passed to the river. It admits that the cost of by-passing this sewage to the river was paid for by the respondent as an extra and the court's attention is called to Exhibit 6, which is a letter dated January 8, 1937, written by the manager of the Bureau of Public Works to the petitioner, covering this particular extra. The petitioner was ordered by force account to lay a 6" temporary drain from the Day property to the river. This order was given by its terms under paragraph D (1) of the contract (Ex. A) and was paid for upon completion as an extra. If the petitioner at that time claimed that it was not paid sufficiently for the work which it was required to do, respondent submits that it should have asked for additional compensation at that time and not have waited until December, 1938, to present such a claim. More than that, paragraph 29 on page 50 of the contract provides that "the flow of all sewers, drains, house connections and water courses met with shall be maintained and provided for by the Contractor, without damage or nuisance to other parties."

It would appear that the respondent was most liberal in paying the petitioner any part of the cost of by-passing this sewage, as it came from a house connection and was actually

covered by the terms of the contract. Certainly the petitioner should not be paid anything more for the work that it did in that connection.

CLAIM NO. 11. TEMPORARY LINE TO DIVERT SEWAGE TO RIVER.

This claim appears to be based on the petitioner's contention that the respondent would not allow it to make this diversion to the river in the most direct line but required it to carry the line down stream a considerable distance, involving the construction of 130′ more of drain than was reasonably necessary. Here again, reference is made to paragraph 28 on page 50 of the contract which requires the contractor to maintain the flow of all sewers and to place additional drains at any place where the engineers shall deem them to be necessary. Under the contract no direct payment is to be made for this work but compensation for the work and all expenses is to be considered as having been included in the prices stipulated for those particular items. Paragraph N (3) on page 28 of the contract also covers this point. As a matter of fact the petitioner did not build 130′ of temporary sewer at this point but less than 90′, and the respondent required it to by-pass the sewage farther down the river for the reason that the slope of the land at that point was more favorable. (Testimony, pp. 1088, 1089)

CLAIM NO. 12. TUNNEL UNDER TREES.

This claim is based on the petitioner's allegation that it was required to build a sheathed tunnel for a distance of 50′ underneath a large tree located on the Williams property near its southerly line and that the contract did not call for this work to be done. Paragraph 98 on page 76 of the contract was inserted to cover situations of this kind. It provides that "the Contractor shall take measures to protect trees from in-

jury by boxing in, by tying back branches, or by other means, and he shall tunnel or do the work by hand where necessary or where directed by the Engineer in order to avoid damage to the tree or roots." The petitioner attempts to avoid the application of this particular provision by referring to other parts of the contract specifications which it claims negative its application to this situation. It claims that it was required to build a sheathed tunnel and its claim is for payment, as stated in its proposal, for 51" pipe in tunnel, which is at the rate of $40 per running foot. In other words, the petitioner is claiming compensation for this small tunnel under some tree roots, whose sides were supported by timber sheeting, at the same rate that it was paid for liner plate tunnelling under the surface of Farmington Avenue from Station 49+89 to Station 50+84. It is also claiming for 50' of tunnel when the exact records of the respondent and the visual observation of respondent's inspector show that the tunnel was not over 12' in length and that the remainder of the work was done in open cut to the north and south of the tree. (Testimony, pp. 996-998; 1085-1088; 1022) Again, the respondent calls attention to the fact that no claim for extras was made in the day and time of this work and that the respondent had no knowledge that the petitioner would make any such claim until December 1938 when its first itemized claim was submitted.

CLAIM NO. 14. SPECIAL FOUNDATION SEAL.

This designation of the particular concrete work covered by this claim is the petitioner's own. (Testimony, p. 558) It does not appear as concrete foundation seal in the contract but is in fact foundation concrete. This foundation is provided for in paragraphs 16 and 17 on page 46 of the contract. No specific thickness of this foundation concrete is mentioned in these paragraphs, nor is any specific thickness mentioned on the contract plans (Ex. C) where under type B-1 and type B-2 appears the notation "Foundation concrete, as ordered

below this line." The arrow accompanying this notation points to the line upon which the sewer pipe rests. The notation to which the petitioner refers in Exhibit H on page 46 is that connected with the *concrete fill* as indicated on the same plan, where the label 6″ min. appears at the side of the section with an arrow pointing to the concrete above the foundation line. It is very evident that the petitioner is confusing the foundation concrete and the concrete fill. It appears to be another case where the contractor has incorrectly read the contract plans or is attempting to secure payment for an extra which it knows is not justified. The petitioner seeks to put its own interpretation on all the contract provisions whether they reasonably permit of such interpretation or not. Here again, the petitioner has exaggerated the distance of 2345′, as the respondent's record shows exactly 1122.5′ where as little foundation as 2″ was ordered.

CLAIM NO. 15. EXTRA COST BY REASON OF WINTER WORK.

The petitioner claims that not only was it put to additional expense in the actual work done under the various items claimed as extras but that by requiring such work to be done outside the provisions of the contract, the respondent delayed the completion of the contract beyond the time specified and that the petitioner was thereby put to considerable additional expense because of work during the winter season when the weather was unfavorable and when the labor was as a result not as efficient. (Record pp. 17, 18)

As having a direct and important bearing upon this claim, the respondent calls the court's attention to two letters which are in evidence as Exhibits U and V. They are both letters written by the petitioner to the respondent addressed to its manager, requesting an extension of time for completion of the contract. The first letter is dated August 12, 1937 when the contractor had been working for a little over one month. This letter requested a five weeks' extension of time, two

weeks of which was on account of the death of Mr. Roscoe N. Clark, a former manager of the Bureau of Public Works of the respondent, which resulted, according to the letter, in a delay in awarding the contract and the remaining three weeks of which was on account of the inability of the manufacturer of the reinforced concrete pipe used in the work to furnish the required size. The second letter, dated December 23, 1937, which was within a week of the date when the contract was supposed to be completed and approximately a week after December 15 when the petitioner claimed it expected to complete the contract, asked for an additional five weeks' extension, or ten weeks in all, because of the unfavorable weather during the preceding six months, especially during the summer, whereby the completion of the work had been hindered. It will be noted in connection with the various claims of the petitioner that both of these letters were written after many of the items of construction claimed by the petitioner as extras had been completed and which the petitioner now claims involved tremendous delay in the completion of the contract and yet there is not one word in either of these letters citing these various extras as the cause of any of the delay in the completion of the contract or as the basis of either of the requests of the petitioner for an extension of time. As shown by Exhibit 30, 278 feet of cradle north of No. 4 crossing was completed on July 16, 1937, and 130 feet south of the same crossing was completed on September 15, 1937. The northerly section of 242 feet of cradle on Judge Clark's property was completed during that same month. In October, 1937, the 198 foot section of cradle on the Seminary property was finished and the southerly cradle section of 92 feet on the Jacobus property was installed by December 17, 1937, which was several days before the letter of December 23, 1937 (Ex. V) was sent by Mr. Ciraci. Only the northerly section of 90 feet on the Jacobus property and the short southerly section of 60 feet on the Clark property remained to be done after the date of these letters. Out of approximately 1090 feet, around 940 feet had been completed before December 23, 1937, or more than 86% of the cradle work.

Surely, if the petitioner considered the various items of claim, and especially the cradle work, as being outside of the contract or as extras under it, it would not have failed to put them forward as cogent reasons for the substantial extension in time requested. As it had at that time, according to Mr. Ciraci's testimony, the promise of the respondent that it would be paid additional compensation for those items, it seems unbelievable that it would have failed to call them to the attention of the respondent in these letters. It seems all the more likely that this would have been done because the petitioner apparently had from the very beginning engaged local counsel to advise and direct it, as the contract was itself signed on behalf of the petitioner by one of its present counsel acting as attorney in fact (See Ex. A) and Mr. Ciraci testified that the letter of June 7, 1937, (Ex. 25) written by him to the respondent had been discussed with that same attorney before being signed by him and sent out. (Testimony, pp. 360, 361, 467)

It should be noted that the contract contains a definite provision as to how the contractor shall make claim for extension of time to complete the work where completion has been delayed by causes beyond its control. On page 24, Section I, paragraph (2) it is provided that "he shall be entitled to such reasonable extension of time for the completion of the work as may be decided upon by the Engineer, provided, however, that *no claim for an extension of time for any reason shall be allowed unless, within three (3) days after such delay occurs, notice in writing of the fact of said delay, its causes, and the extension claimed shall be given by the Contractor to the Engineer.*"

It is very evident that Mr. Ciraci was familiar with that paragraph and that he wrote the two letters on behalf of the petitioner in compliance with it. He now seeks to repudiate that provision of the contract also, as he has those provisions applicable to the petitioner's other claims. The contract is reasonable in this regard and the petitioner should be required to abide by it.

When Mr. Ciraci was confronted with these two letters

asking for an extension of time for the completion of the contract he lightly stated that he could still have completed the contract by December 15th in spite of the causes of delay mentioned in the letters, but that he simply wanted to be sure that he had leeway enough so he would not be penalized under the clause providing for liquidated damages. (Testimony, pp. 561, 562) Even at that time he had in mind that he would be subject to such damages. In the opinion of the respondent these letters and Mr. Ciraci's testimony with regard to them show very clearly that there was no misunderstanding on the part of the petitioner as to the character of the various parts of the construction work that it now claims for as extras, or as being entirely outside the original contract, and that they were not the cause of the delay in the completion of the contract. Surely, Mr. Ciraci would not have missed the opportunity of including in those two letters some mention at least of the items which he now claims caused so much delay in the completion of the work and for which he claims his company should be compensated by the payment of large extra sums. In fact, the petitioner's claim for extras is approximately 50% of the bid price and if Mr. Ciraci was so careful to go to his attorney before the contract was even awarded him so that he would not sign any letter which might commit him to anything unfavorable, he would not have failed to consult with this same attorney, who is one of petitioner's counsel in this case, to be sure that his claim for an extension of time was put in proper legal form, so that he could be assured of securing the necessary extension and would not be penalized for liquidated damages. He would then have been on solid ground in seeking such an extension.

One important reason for the failure of the petitioner to finish the work within the contract limit was its refusal to heed the advice of Mr. Brewer to do the work in the low parts in the river valley at the very beginning so that it would not be impeded by weather conditions. (Testimony, pp. 864, 868, 869, 933) Another reason for the delay may have been its failure to secure pipe promptly, but this was not chargeable to the respondent. (Testimony, pp. 370, 371)

CLAIM NO. 16. REFUND OF LIQUIDATED DAMAGES.

The respondent deducted the sum of $3540 from the amount computed to be due petitioner as liquidated damages for failing to complete the contract on December 31, 1937. The trial court held that the contract was substantially completed on March 31, 1938 instead of August 9, 1938 as claimed by the respondent (R. p. 44) and reduced the amount by $2200 for which it rendered judgment for the petitioner. The petitioner claims that no liquidated damages were justified as the delay was caused by extra work ordered by the respondent. The findings of fact made by the trial court negative that contention. (R. p. 46)

The petitioner claims that respondent introduced no evidence to show actual damages and that no actual damages appeared to have been suffered by it. Item 24 on page 17 of Exhibit A states that the entire work is to be completed on or before December 31, 1937, and in paragraph I (3) on page 25 of the contract it is provided that the contractor shall pay to the District the sum of $20 a day as liquidated damages for each day after said completion date that the work is not completed. The contractor was notified in paragraph 1 of the specifications on page 40 of the contract that this particular construction work was but a part of a large project and that the contractor must cooperate with other contractors on other parts of the work so as to secure the orderly and proper construction of the entire project. This contract was one of several, comprising an entire new intercepting sewer system for The Metropolitan District, which comprised the City of Hartford and the towns of Bloomfield, Newington, Wethersfield and Windsor. In such a contract as this it is impossible to determine what the damages may be as a result of failure of the contractor to complete his part of the work at the time specified. Such failure interferes with the operation of the system and may well delay other parts of the construction program. Under these circumstances it has been time and again held by numerous decisions that a liquidated damage provision of this sort is legal and enforcible provided it is

reasonable in amount. Certainly the sum of $20 a day for each actual working day is not excessive on a contract involving the expenditure of around $140,000 and the trial court has so found. (R. p. 43)

The following authorities are cited as typical of the court decisions upholding such a clause.

Williston on Contracts, Rev. Ed., Vol. 3, p. 2210, Sec. 785;
Wise *v.* United States, 249 U. S. 361, 365, 366;
Maryland Dredging Company *v.* United States, 241 U.S. 184;
Bankers' Surety Co. *v.* Elkhorn River Drainage Dist., 214 Fed. 342, 347;
Banta *v.* Stamford Motor Company, 89 Conn. 51.

The respondent had to keep inspectors on the work every day until it was completed and this was a definite extra expense to it until the workmen were off the job. (Testimony, p. 958)

The respondent did not waive its right to liquidate damages by permitting the petitioner to finish the work after the time fixed for completion even though it did not grant an extension of time. Such action is authorized by Section I, paragraph (3) on page 25 of the contract.

The petitioner lays stress on the failure of the respondent to counterclaim for the amount of the liquidated damages to which it claims to be entitled by reason of the delay in the completion of the contract by the date set by its terms and it contends that the respondent has thereby waived any claim to such damages. The respondent withheld the sum which it claimed to be reasonable under the liquidated damages clause of the contract and No. 13 (a) of the Rules of Civil Procedure is not applicable. Petitioner alleged in its complaint (Par. 27, R. p. 17) that the sum was wrongfully withheld and the respondent's answer denied it. The respondent is therefore not trying to put forth a set-off or counterclaim to any of the petitioner's claims but is denying the petitioner's right to recover.

PETITIONER'S CLAIM FOR EQUITABLE CONSIDERATION ON QUANTUM MERUIT

The petitioner introduced evidence for the purpose of showing that it had expended more money in the completion of the contract that it was entitled to receive under its bid. It claims that the respondent was therefore unjustly enriched because it had received a completed job that was worth more than the price paid for it and cites numerous cases in an attempt to support its position. The trial court considered this phase of the case and arrived at a conclusion adverse to the petitioner (R. p. 41), as it found the figures of cost to the petitioner unsatisfactory because of its incomplete accounting records.

It does not follow that the respondent should be required to pay the total amount of the petitioner's cost simply because it is in excess of the amount which the petitioner was entitled to receive under its bid. The petitioner, in effect, asks the court to disregard the contract price as fixed by its own bid price on the various items in the proposal and to substitute a cost plus contract under which it would receive approximately 50% more. This the trial court refused to do, largely because it did not credit the testimony of the petitioner's witnesses. Having found the facts in regard to various items of claim in favor of the respondent and that all work done was covered by the original contract and having found that no basis for equitable relief to the petitioner existed it was logical that the trial court should have refused additional compensation for the work.

The petitioner contends that the trial court failed to make findings on important points raised in connection with certain of its claims. An examination of the findings of fact made by the trial court (R. pp. 45-46) will show that in addition to the detailed findings of fact made on each of the various claims of the petitioner, it definitely found paragraphs 7 to 26, inclusive, and paragraphs 28 to 37, inclusive, of the petitioner's complaint not proven. The trial court therefore found the facts with regard to each of the petitioner's claims against it. The petitioner

refuses to recognize these findings although they are within the province of the trial court and adequately supported by the evidence introduced.

The respondent submits that the finding of facts made by the trial court is decisive of this case.

> Alabama Power Co. *v.* Ickes, 302 U. S. 464, 477.
> General Talking Pictures Corp., *v.* Western Electric Co., 304 U. S. 175, 178.
> Dooley *v.* Pease, 180 U. S. 126, 131;
> Pressed Steel Car Co. *v.* Union Pacific R. R. Co. (C. C. A. 2d Circ.) 297 Fed. 788, 790;
> Gould Securities Co. *v.* U. S. (C. C. A. 2d Circ.) 96 Fed. (2d) 780, 781;
> Federal Rules of Civil Procedure, No. 52, 28 U. S. C. A., page 677.

The petitioner was fully informed as to the character of the work and the surrounding conditions not only by the provisions and specifications of the contract but by the additional information contained in a letter written by Mr. Brewer, the engineer in charge, to his superior, the manager of the respondent's Bureau of Public Works. A copy of this letter dated June 3, 1937 (Ex. 22) was shown to Mr. Ciraci (Testimony, p. 350) and by him taken up with his attorney who appears of counsel in this case. (Testimony, p. 467) This letter expressed the writer's concern that the petitioner had misjudged the conditions under which the contract was to be performed because some of its bid figures were so low. The petitioner replied to this letter on June 7, 1937 (Ex. 25) stating that the bid was made with full knowledge of the circumstances and asserting its willingness to do the work for the prices submitted. The contract had not been awarded at that time and the petitioner could have withdrawn. It chose not to.

It sought to justify its action by claiming that in the case of certain items specifically mentioned in the letter (Ex. 22) it received more under its method of bidding than it would have received by submitting a balanced bid. But Mr. Brewer's letter called attention to many of the conditions affecting the work which apparently went unheeded and the lack of attention to which on the part of petitioner resulted in many of the

difficulties which it encountered in the prosecution of the work with the attendant additional expense to it. It now seeks to have the respondent reimburse it for this expense.

For instance, among the items mentioned in the letter are items 7 and 8 of the proposal (Ex. A, pp. 14 and 15) which cover foundation concrete Class A and Class B required in the construction of the cradle. This comprises one of the largest of petitioner's claims. Both of these items cover foundation concrete *in place* and therefore involve labor costs and are definitely the basis of claims 1 and 15. Petitioner's Exhibit PP contains no answer to the objections raised by Mr. Brewer's letter, for the unit prices shown in the so-called balanced bid are still much lower than the average figures given in the letter and Mr. Brewer lays particular stress on those items.

The petitioner entirely misconceives the comments of the trial court with regard to Exhibit 22. The court clearly felt that after such a warning the difficulties in which the petitioner found itself during the construction work under the contract were of its own making. This was one of many circumstances surrounding the performance of the contract which the trial court had the right to take into consideration in arriving at its decision that any added expense which the petitioner may have incurred in the work done under the contract was not due to any act of the respondent.

The petitioner contends that the trial court was in error in its construction of the provisions of the contract (Ex. A, p. 21, par. C) making the engineer the judge as to the meaning, intent and performance of the contract. The cases universally hold that this is a valid and enforceable provision so long as the engineer acts in good faith and does not abuse his power.

Ripley *v.* United States, 223 U. S. 695, 704;
Beattie *v.* McMullen, 82 Conn. 484;
Cranford *v.* City of New York, (C. C. A. 2) 38 Fed. (2d) 52, 54;
54 A. L. R. Ann. pp. 1255 ff.

The trial court has found as a fact that the respondent's engineer did act in good faith and that his decisions were binding upon the petitioner. Moreover, the findings of fact show

that in no instance did the petitioner question any decision of the respondent's engineer at the time it was made and the order given. It did claim that the engineer waived the testing of some of the river crossings but the trial court found that the engineer did not in any instance do so. This finding of fact cannot be questioned by the petitioner as it was made upon conflicting evidence and the trial court was the judge of the credibility of the witnesses.

The petitioner charges the respondent's engineer with fraud and concealment of information, although the trial court definitely found to the contrary. It seems to the respondent that any fraud in the case was on the part of the petitioner. No notice of any kind was given to the respondent that claims were to be made for extras and, what is even more amazing, definite requests for extensions of time were made *under the provisions of the contract* and based on entirely different grounds from those now put forward. After the contract is substantially completed the respondent receives a letter from the petitioner's attorney which is merely a notice of a claim to come and is not followed by a detailed claim until *ten months later.* And the petitioner now asks the court to accept, not the figures contained in the claim then submitted (Ex. 13), but figures totalling a much larger amount as expressly prepared for purposes of this action. (Ex. H)

CONCLUSION

The respondent contends that all of the work done by the petitioner was covered by the provisions of the contract; that it is not entitled to extra compensation, either under the contract or outside the contract, under any of the theories put forth by it; that the findings of the trial court, which are adverse to the petitioner and which were accepted by the Circuit Court of Appeals, are fully supported by the evidence; that there are no questions of law raised by the petitioner which have not already been decided by this honorable court; that the decision sought to be reviewed is not in conflict with the decisions of this

honorable court, with those of the Connecticut courts or with the weight of authority of the applicable decisions of other state and federal courts. The respondent therefore submits that the petitioner has failed to show any grounds for the issuance of a writ of certiorari and that the petition should be denied.

Respectfully submitted,

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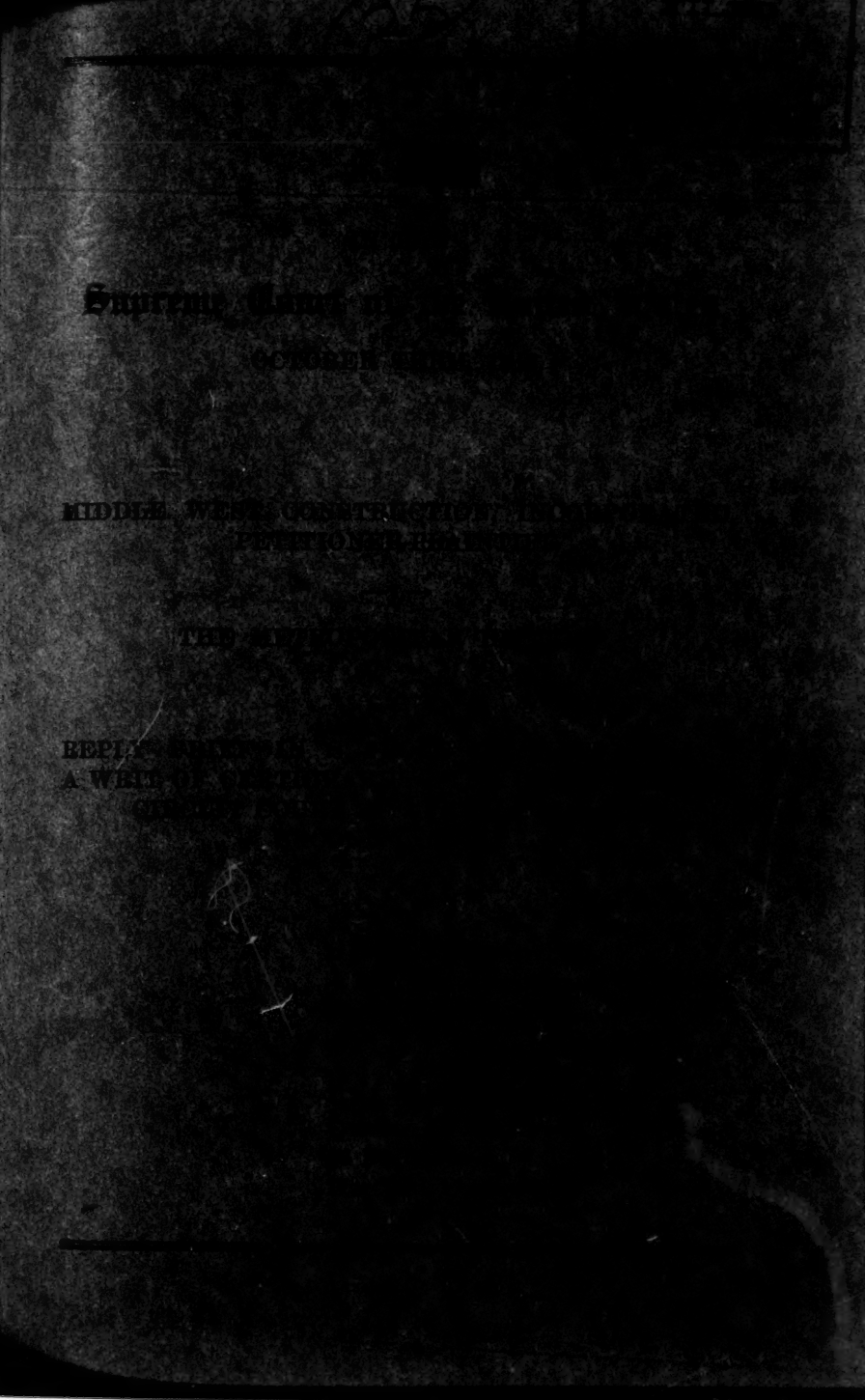

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Erie Ry. Company v. Tompkins, 304 *U. S.* 64.

From *Eldridge v. Hawes*, 4 *Conn.*, 465, 469, to *Mackey v. Dobrucki*, 116 *Conn.*, 666, and *beyond in both directions*, the *guiding star* in this State has been doing *justice between both parties*, and *avoiding injustice, hardship, oppression* and *over-reaching* by *one party even though he may have some technical "legal right."*

In the *Mackey* case, *supra*, the Court says:

" . . . Equity will relieve a party against *forfeiture* and *penalties* not occasioned by his *wilful neglect*, upon the principle that one having a *legal right shall not be permitted to avail himself of it for the purpose of injustice or oppression . . . .*" (Italics ours).

An analysis of the applicable Connecticut cases (Main Brief, pp. 2-17) should convince any *reasoning mind* that contracts are to be construed to do *equity* and *justice* between *both parties*, reached by the rules of *reason, judicial logic*, and the *application of equitable principles;* to render *justice* and to *avoid injustice* and *oppression.*

This Honorable Court long ago laid down the same principles.

Hume v. United States, 132 *U. S.* 406.

Applied to this case, where the contract, Ex. A, 4 blueprints, Exs. B, C, D and E, admittedly comprise the entire contract (Respondent's Brief, p. 1), a *just and equitable*

result was not reached, but a strained and unreasonable construction placed on these written documents which results in hardship, injustice, oppression, and inequitable consequences to petitioner, and to the unjust enrichment and material increase and advantage of respondent.

Tryon v. White, 62 *Conn.*, 161ff.
E. & F. Construction Co., v. Stamford, 114 *Conn.*, 250ff.
Blakeslee v. Water Comrs., 121 *Conn.*, 163-180.
Blakeslee v. Water Comrs., 106 *Conn.*, 642ff.
Cases cited in *Main* Brief, pp. 2-17.

Patently, respondent's Argument, which both Lower Courts adopted, is divorced from reason, from the *objects reasonably contemplated by the parties, from their situation, and from their real intention in entering into the contract. The written documents they executed present pure questions of law, as they comprise the entire contract.*

Mazzotta v. Bornstein, 104 *Conn.*, 430, 435.
Salt Lake City v. Smith, 104 *F.* 457.

They fix the scope of the undertaking and limit the risks to what is therein set forth, and are to be construed against the author.

Day v. United States, 245 *U. S.* 159.
Carnegie Steel Co., v. United States, 240 *U. S.* 156.

Every intendment is to be made against a *construction* which would operate as a "snare." A harsh and oppressive one will not be adopted.

Utley v. Donaldson, 94 *U. S.* 29, 46-48.
Memphis v. Brown, 20 *Wall.* 289.

Business contracts must be construed with *business sense*, as they naturally would be understood by intelligent men of affairs.

Nothwithstanding these cardinal rules of construction universally recognized and applied, respondent, under cover of the contract, enlarged and remoulded by its Engineer, whom both lower Courts erroneously construed to have "very extensive discretion" and power to enlarge and remould the contract as being "within his contractual powers," (R. p. 34, top; 133 *F. 2d* par. 2, p. 469), sought and obtained for itself large benefits, without paying therefor. In addition, by invoking the "general terms" and "broad stipulations" of this, a municipal contract, prepared by its attorney to insure it being air-tight, it also sought and obtained from said Courts a construction of that contract which was not only over-literal and unjust, but one which took no reasonable account of the "special provisions" which both parties expressly agreed should govern (Ex. A, p. 40), nor of the "restrictive clauses" appearing generally in the same paragraphs (Petition, p. 5), and thus enlarged and remoulded the contract to its increase and advantage.

Long ago, both this Honorable Court and the Connecticut Supreme Court and the great weight of authority forever put an end to such a construction.

In *Miller Bros. v. Maryland Cas. Co.*, 113 *Conn.*, 504, 514, our Supreme Court held that a trial court cannot *ignore* the *restrictive provisions* and that *particular language must prevail* over the *general*.

In *Smith v. McCullough*, 104 *U. S.* 25, this Honorable Court held general words in a written instrument cannot be detached from explanatory words immediately following, in determining its meaning.

In *Mutual Life Ins. Co., v. Hill*, 193 *U. S.* 551, it held that where parties express themselves in "special terms", attention is directed to the "special matter" and it must be assumed that it expresses their intent, while "general mat-

ter" does not mean the parties had that *particular matter in thought.*

In *Water Comrs. v. Robbins,* 82 *Conn.,* 623, our court pointed out the importance of this principle to an intelligent appreciation of the questions involved, saying:

". . . A closer analysis reveals that the real character of the fraud . . . is thus too narrowly stated. That fraud is one which resulted not only from the actions . . . inducing the contract . . . by means of . . . representations purporting to be based upon information as to what its general terms and elastic language as related to the uncertain conditions involved in its subject matter would require of them in the performance of the work undertaken, but also from the disregard of these representations . . . made in subsequent actions and requirements under cover of the terms of that contract thus obtained. It is the advantage taken of the indefinite terms of the contract to exact what the contractor had been led to believe by authoritative statements and representations would not be exacted that furnishes the real cause of complaint and fills out the measure of fraud.

The representations involved there, as here, the approximate amount of work comprehended in the project as contained in the written documents issued by the Commission and its Engineer, which the Court construed to carry an assertion of superior knowledge and information for the purpose of supplying knowledge and information to bidders they expected to act upon, in a business dealing, and who were entitled to and did promptly act upon it as information having a basis in superior knowledge, not equally available to bidders, and involving investigation of conditions, study, and computations requiring expert knowledge, "if not also a search of the minds and purposes of the members of the board."

It held that the Commission was in a position there, as here, to have "not only a superior knowledge, but also a knowledge which had a *foundation in expert examination and study,*" made to be acted on, and promptly acted on, and con-

sequently, as to "any affirmation contrary to the truth" to secure some benefit, the law will hold it liable although it spoke in "ignorance of the facts." (citing cases).

In the eyes of the law as there expounded, petitioner did not act at its "peril" in relying, as it did, upon respondent's representations. That case expressly holds that the *law sanctions no such proposition.* This principle accords with that laid down in *Hollerbach v. United States,* 233 *U. S.* 165; and *Christie v. United States,* 237 *U. S.* 234, and others too numerous to cite, that it made a representation upon which petitioner had a right to rely without an investigation to prove its falsity. The *latter* also *takes into consideration that* "time" *did not permit one,* and such representations are based upon specific investigation which *protect against extravagant price based on conjecture of conditions,* and that it made no difference they did not have a *sinister* purpose in making them. Here, it was expected *petitioner would rely and act upon them* as a *basis for making its bid.* (Mr. Brewer, pp. 914, 929, 968-970).

Both lower Courts were clearly wrong in basing their decisions upon warnings in the blueprints (R. pp. 36, 37, 38) *involving directly Claims* 2, 3, and 6, but *in result,* 1, 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, 15, *amounting to $62,000, or 90% of all claims.* The other claims *are* extras under *express terms* of the contract, referred to in Main Brief under individual claims.

The representations in the documents are *presumed, as matters of law, the inducing, though it need not be the only inducing cause;* here, respondent, expected us to rely upon the express representations in the documents, and *knew errors or mistakes* would *put a bidder at a disadvantage.* (Mr. Brewer, p. 914).

Taylor v. Sprague, 58 *Conn.,* 542.
Hollerbach v. United States; and *Christie v. United States,* and cases herein and Main Brief, pp. 2-17.

These *contract rights* of *petitioner*, resulting from these decisions, and others, culminating in *E. & F. Constr. Co., v. Stamford*, 114 *Conn.*, 250, 259, 260, *establish its right of recovery in contract or in tort*, in the *nature of* a breach of warranty, *even though such representations were made innocently and in perfect good faith;* whereas, both lower Courts interpreted the situation *as falling within the field of fraud.* (R. p. 46, par. 3, under Conclusions of Law; 133 F. 2d. par. 6, p. 470).

Both said Courts clearly erred in their construction and application of our local law of innocent representations and were clearly wrong in denying recovery because they concluded there was no fraud, misrepresentation or misleading.

E. & F. Constr. Co., v. Stamford, 114 *Conn.*, 250ff. and numerous cases and authorities cited and discussed.

The *bases of recovery* in Connecticut and many other States, and in federal Courts *are not so narrowly restricted*, but recovery is allowed on *some other theories*, most appropriate of which is *quantum meruit.* In *all* of the cases *recovery is allowed to avoid injustice to the contractor and unjust enrichment to the owner.* In the *E. & F.* case, *supra*, our Court says:

" . . . The plaintiff is entitled to redress in this action for its loss, due to defendant's misrepresentations, equally with its right to rescind . . . and for the same reason, that it would be unjust for a party, who has made misrepresentations, even innocently, which concerned the subject-matter of the contract, and induced the other party to enter into it, to retain the fruits of a bargain induced by such misrepresentation . . . The defendant is responsible for the consequences of the plaintiff's reliance on its misstatements regardless of whether made in good faith."

There reasons, buttressed by these cases constituting the weight of authority, we submit, are sufficient grounds for granting our petition.

The *tort rationale* is *inappropriate* in *most* cases, as here, where the *deviations between estimate and actuality may have resulted from inherent unpredictability* of work to be done and it cannot be reasonably said that the *minds of the parties have met on the work actually necessary to complete the contract where actuality belies estimate and representations.* *Quantum meruit* covers this *excess* work *requested, ordered* or *directed,* or which has been *acquiesced in* or *accepted* by the *owner* as being "new and different work" *not covered by the estimates and bids, and upon which the minds never met.*

Salt Lake City v. Smith, 104 *F.* 457.
Freund v. United States, 260 *U. S.* 60.
Mahoney v. Hartford Invest. Corp., 82 *Conn.,* 280.
E. & F. Constr. Co., v. Stamford, 114 *Conn.,* 250.
51 *Yale L. J.* 162, and cases cited.
76 *A. L. R.* 258, and *Anno.* 268ff, and cases discussed.

It allows relief without the *stigma* of *damages* and *misrepresentation* and it is not necessary to *disturb* the *express contract nor to call into use any of its unfair and unconscionable exculpatory clauses.*

Both lower Courts were clearly wrong in holding that "Hence this contract and these provisions . . . must determine the present claim unless it is proven that they were modified by either a new agreement or the defendant's waiver of provisions for its benefit and protection . . ." (R. p. 26; 133 F. 2d. par. 1, p. 469). *Such a narrow construction—solely a question of law—is clearly erroneous.*

Said Courts *emphasized* and *further extended* their errors in *refusing to apply the local law of waiver as laid down in Mahoney v. Hartford Invest. Corp.,* 82 *Conn.,* 280, 287, *where it was held that* "directions by him, for the performance of this work not called for by the contract, are necessarily and

of themselves a waiver of any requirement for written orders . . . ."

See *Anno.* 66 *A. L. R.* 650ff, and many cases discussed.

The same applies to their *refusal to consider or apply our local law of estoppel,* as laid down in the latter and other cases cited in Main Brief, (pp. 8, 9), and others there cited. *Estoppel* is *particularly appropriate* here because respondent's *general agents* were present, *admittedly,* and *knew* both the *nature* and *extent* of *all work done.* (Ex. 23).

Blakeslee v. Water Comrs., 121 *Conn.,* 163, 180.

Simply stated, estopped allows recovery where equity and good conscience require, irrespective of legal rights.

Basak v. Damietz, 105 *Conn.,* 378.

Both said Courts were clearly wrong, *not only* in their refusal to apply the above and other *equitable principles* claimed, *but also* in their *construction of the contract,* which *in effect,* gave the *Engineer unreasonable power and discretion to enlarge and remould it, and afterwards, to construe the law of the contract.* This is both against *public policy* and against the *weight of authority.*

Freund v. United States, 260 *U. S.* 60.
Salt Lake City v. Smith, 104 *F.* 457.
Anno. 137 *A. L. R.* 530ff(and cases discussed.
United States v. Stage Co., 199 *U. S.* 414, and cases cited.
Cases cited, Main Brief, pp. 21-23.

Both said Courts were clearly wrong in *failing to hold* that the *exculpatory provisions* of the contract, in this, and usual in such contracts, that the contractor relies on his own examination of the site, and the owner shall not be responsible for any errors, inaccuracies, and the like, *are against public policy* and *unenforcible.*

Ford v. Dubiskie, 105 Conn., 572 and cases cited.
Bridger v. Goldsmith, 38 *N. E.* 458ff.
Ganbay Bros. v. Butler Bros., 56 *A. L. R.* 1, and *Annotation.*

Generally, and as embracing good reasoning and application of the law to *dry words* and *broad stipulations* common in corporation contracts, and reaching a just result, the attention of the Court is invited to *Salt Lake City v. Smith, supra,* where the Court says:

"... No such work was in the minds of the parties when they made this contract, nor could they have intended to authorize so radical an alteration of the nature of the work as to require it. Since they did not contemplate or intend to contract concerning it ... it was new and different work ... and the plaintiffs were entitled to recover its reasonable value ... This was the theory upon which the case was tried, and it was the true theory. It is just to the city, fair to the contractors, and it accords with reason and established law. The dry words and broad stipulations of contracts must be read in the light of reason and of the subject contemplated by the parties. The stipulation common to many corporation contracts, that contractors may be required to perform extra work at the price named in the agreement or fixed by an engineer, is limited by the subject matter of the contract to such proportionately small amounts of extra work as may become necessary to the completion of the undertaking contemplated ... when the contract was made; and work which does not fall with this limitation is new and different from that covered by the agreement, and the contractors may recover the reasonable value thereof notwithstanding the contract. The customary provision ... that the corporation or its engineer may make any necessary or desirable alterations ... is limited in the same way ... to such modifications of the work described in the contract as do not radically change its nature or its cost ... work required by such alterations that are substantially variant in character and cost from that contemplated ... constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value (citing Henderson Bridge Co. v. McGrath, 134 U. S. 260; Elgin v. Joslyn, 26 N. E. 1090, both leading cases, and others).

The stipulation . . . that all questions, differences, or controversies between the corporation and the contractors under or in reference to the agreement and the specifications or the performance or non-performance of the work . . . shall be referred to the engineer, and his decision thereof shall be final and conclusive . . . does not give the engineer jurisdiction to determine that work which is not done under the contract or specifications, and which is not governed by them, was performed under the agreement and is controlled by it, and his decision to that effect is not conclusive on the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it upon himself by erroneously deciding that he has it . . ."

A contract embodies the law of the place of making and performance.

Wood v. Lovett, 313 *U. S.* 362.

The above cases and their reasoning and application, lead inescapably to the conclusion that both said Courts clearly erred in their construction and application of the this a Connecticut contract. In *Montrose Constr. Co. v. Westchester County,* 80 *F.* 2d. 841 and 94 *F.* 2d. 580, the *Second Circuit construed* such a contract and reached a *different result from that reached here.* It quoted with approval from the *Salt Lake City* case, *supra,* applied the reasoning therein, *despite a provision in the contract that no more than 600' of compressed air would be paid for no matter how extensive such use was necessary to complete the contract work.* While it *called* recovery *damages in relying on a warranty in making the bid,* in *reality* it was *because the provisions of the contract* "cannot be given the effect of completely negating the representations in the plans . . ."

Counsel *erroneously says* (Brief, p. 4) that *examination* shows in every instance the court found in favor of the prevailing party the facts upon which it based its decision, and argues that this Court must also accept the facts found under Rule 52 F. R. C. P. This rule expressly *excepts findings which are clearly erroneous.*

In the *Freund* case, *supra,* this Court rejected the conclusions of the trial court; and likewise, in the *Montrose* case, the *E. & F.* case, the *Mazzotta* case, *all supra.* The *Mazzotta* case, *supra,* is *particularly* in point, because our Supreme Court held that the *construction of a contract and specifications* presents a *question of law,* and *reversed* the trial court. Briefness forbids further analysis, but the rule allows and it is almost universally held that where a finding is based on a *misconception of the law material to the issues,* it will be set aside or modified or judgment entered as justice requires.

Davis v. Margolis, 107 *Conn.,* 417, 422.

An *erroneous conclusion* is *an error of law* and *not an error in an inference of fact.*

Hayden v. Allyn, 55 *Conn.,* 280, 289.

This Honorable Court may place the proper construction on this contract, *regardless of the finding.*

Columbia Water Pow. Co. v. Columbia El. Co., 172 *U. S.* 475.

Beckwith v. Farmington Co., 77 Conn., 318, 320

It may *substitute* its *judgment* for the lower Courts if they *erred in the application of the rules of law material to the case,* or, the *conclusions of the lower Courts are violative of rules of logic, reason, and are contrary to or inconsistent with subordinate facts or so illogical, unreasonable or orbitrary as to be unwarranted in law.*

Johnson v. Shattuck, 125 *Conn.,* 60, 62-3.
Deputy v. Dupont, 308 *U. S.* 488, 489.
Bogardus v. Comr., 302 *U. S.* 34.

On an *appeal in equity* the appellate court should review facts as well as law; the finding is not conclusive—otherwise such a review would be a *delusion and a snare.*

Colby v. Riggs Nat'l Bk., 92 *F.* 2d. 182, and cases cited.

This is especially true where the contract is in writing and only questions of law presented.

United States v. Ga. Ry. Co., 107 *F.* 2d. 3.

As the entire record is before this Honorable Court, it has power to direct the disposition which should have been made on appeal, notwithstanding certain errors of law were not argued, nor presented by the Petition.

Kessler v. Strecker, 307 *U. S.* 22.
Story Parchment Co. v. Patterson Etc. Co., 282 *U. S.* 555.

CLAIM NO. 1 PERFORMED CRADLE WORK, $22,626

Respondent's claim that this claim is covered by the provisions of the contract and specifications and is, in reality, Type C construction, and that in Type C construction foundation concrete was required to be "cured" before laying the pipe thereon, *is too extravagant a construction of the contract to be entertained for a moment.* It is a *fair presumption,* that had such "curing" been *anticipated* by respondent, and it *openly wished* it to become a *part of the contract,* such procedure would have been *adequately* "described" to give petitioner a *reasonable opportunity to figure the additional cost thereof in its bid.* It would have then become a *prominent feature* of the *agreement,* as it should be—if *fair and honest dealing is maintained.*

Alford v. Belden, 4 *Conn.*, 461, 464-5.
Mahoney v. Hartford Invest. Corp., 82 *Conn.*, 280, 284-5.

In the *latter* case, our Supreme Court says:

> "Had it been anticipated that this entire drainage system was defective, and that a new one would have to be substituted, it is fair to presume that the repair of it would have constituted a definite feature of the written agreement . . ."

Respondent *admits* preformed cradle is not described in the contract specifications (Respondent's Brief, p. 10). It argues, however, that under Ex. A, p. 40, par. 2, this method of preforming the foundation concrete—or Type C—is to be considered properly described, and that even to a layman no planks and sills are shown on Type C and the indication is of some "formed foundation" on which the sewer pipe rests; that it cannot be installed, unless it is preformed—a process known as "curing".

A complete answer to all of these and other like contentions is: Respondent knew how to write specifications for "curing", and did write them concerning the "curing" of the pipe itself—which petitioner obtained from the Lock-Joint Pipe Company with respondent's approval. See Ex. A. par. 65, p. 63 under *one* method, pipe were to be "cured" until "6 days old"; by another until "3 days old."

Had it *openly* anticipated "curing" in Type C, it could have *as effectively described* the *method of construction and the curing period of it! Common honesty and fair dealing* would *require such a description*—and it would have become a *prominent* and *definite* feature of the agreement.

> *Alford v. Belden*, 4 *Conn.*, 461, 464-5.
> *Mahoney v. Hartford Invest. Corp.*, 82 *Conn.*, 280, 284-5.

But respondent described "in detail" "another entirely different method of construction of Type C in the *contract and specifications, and definitely contracted that this different method should govern."* (Ex. A, par. 82, p. 71).

This was the *first* of the "Special Provisions", which, by Ex. A, p. 40, provided:

> "Should the requirements of the Special Provisions at the end of these specifications conflict with any requirements preceding them the Special Provisions shall govern."

In the very first line of par. 82, Ex. A, p. 71, Types B-1, B-2 and *C Construction* are to be construed as therein fully set forth, all by the *same method, exactly.*

The trial court held (R. p. 32):

> " . . . It is obvious that Types A and B-1 and B-2 do not require preforming or curing of the concrete base . . . ;" but went on immediately to reason—contrary to the above specifications in par. 82, Ex. A, p. 71—that Type C would have to be "preformed." (R. p. 32ff.).

It then refers to *Exs. C and D* to support its reasoning, but said (R. p. 33):

> "Plaintiff also asserts that the specifications of the contract set forth in Ex. A negative the time interval for curing. These are not wholly free from ambiguity . . ."

We have shown (Main Brief, pp. 26-30) that Exs. *C* and *D reasonably construed do not support the lower Courts in their conclusions that preforming or curing was required; or even reasonably described,* so as to *indicate* to a *bidder* that "curing" would be required by the Engineer. This, respondent's Engineer *admitted* (p. 942), but nevertheless, both Courts *erroneously construed Exs. C and D* as requiring the cradle to be "cured", *despite the admission* and the *detailed description* of *the prescribed methods of constructions set forth in the specifications,* reaching its conclusions by ascribing a *very extensive descretion* in the Engineer, and *contractual powers to so enlarge and remould the contract.* This was not only clearly *erroneous, illogical, unreasonable* and *unwarranted in law,* but was *diametrically opposed* to the *explicit terms* of the *contract, restricting both his discretion and his contractual powers,* if any, to: "The Engineer will direct which method is to be used." The two methods were:

(1) The pipe may be laid upon *approved sills* and the *concrete poured in place underneath and around the pipe,*

or

(2) the *sills* may be set and concrete *poured* to a point slightly above the bottom of the pipe, and the pipe *immediately* laid upon the *fresh concrete* and *sills; the remaining concrete to follow closely.* The Engineer will direct *which method* is to be used. We submit that by no process of logical reasoning could one arrive at a conclusion that the foundation concrete would have to be "cured" before the pipe is laid, under any reasonable construction of the contract, which prevails over the plans.

Cruthers v. Donohue, 85 *Conn.,* 629, and cases cited.
Wilson v. Riddle, 128 *Conn.,* 100, 103.

Neither the Engineer nor the Courts have jurisdiction nor could he or they confer it on themselves, to *enlarge* and *remould* the contract and specifications nor to so *misconstrue the contract.*

Salt Lake City v. Smith, supra.
Freund v. United States, 260 *U. S.* 60.
Anno. 137 *A. L. R.* 542ff. and cases discussed.

Had the contract been *ambiguous,* both Courts should have construed it in favor of *petitioner.*

Horgan v. Mayor, 55 *N. E.* 204.
Drainage Dist. v. Rude, 21 *F.* 2d. 257.

There are *circumstances* that show *beyond doubt* that *even respondent* did not *honestly consider* this preformed cradle as *Type C* construction. *Neither Ex. F nor Ex. G* even "mention" or pretend to be *Type C*—both were prepared and approved by Mr. Brewer *after* the contract was made and *just before* the work was to be *constructed* under them. *None* of respondent's *records* and *diaries mention this as Type C,* although its inspectors frequently noted that work was *Type A, B-1* or *B-2 construction.* (Ex. 23, Inspector's Diary Sections). It did not *allege* in its *answer* that it was

Type C; its claim was made *first* in the trial, all of which shows *conclusively* that the idea of *preformed cradle being Type C* was *indisputably* an *afterthought.*

The *payment clauses* referred to in the finding (R. p. 33) do not *purport* to cover *labor nor delay—only materials* at *unit prices.* Moreover, it is the *contract that prevails* over the *plans,* and the *blueprints cannot add to nor vary its terms.* It follows as a *matter of law* a *method of construction* of *preforming* the concrete was *new* and different *work.*

When even Mr. Brewer, respondent's Engineer in charge, admittedly had no knowledge of, and had not observed any preformed cradle being constructed elsewhere than in Hartford (p. 942) *it is understandable, as counsel admits, that Mr. Ciraci, petitioner's President, was not acquainted with this type of construction.* (Respondent's own testimony shows only 600′ in Hartford, (p. 1121). This is all the *more reason* why a *reasonable description* of it *should have been included in the contract.* The law does not require a party to a contract to be a *mind-reader,* delving into and ascertaining the *secret intentions* of the other party; it was the *highest duty* of *respondent* to *fully and fairly disclose them.*

Water Comrs. v. Robbins, 82 *Conn.,* 623, 646.

Certainly respondent could not and does not claim that use of such "curing" in *three* out of *eighteen* contracts in Hartford, *600′* in several *miles* was an *usage* or *custom* binding petitioner. Sound policy does not permit encouragement of the tendency to construe contracts with regard to *local* usages which the parties made *no reference* to when the contract was made.

Partridge v. Phoenix Mut. Life Ins. Co., 15 *Wall.* 573.

Moreover, a *written* and *express* contract cannot be controlled nor varied by a *local* custom or usage.

Moore v. United States, 196 *U. S.* 157.

The *secret intention* of respondent, that Exs. F and G, should not constitute "written orders", but were *illustrative* of *Type C* falls within the above principles and is *untenable.* Had it so *openly intended* them, it would doubtless referred to *Type C on their face.*

The *importance* of "grout", as respondent well knows, does not lie in the cost of *material* but becaus it *changes materially* the *"method"* of *construction* from *progressive* to one of *slowness.*

Every day's *delay* adds *materially* to the expenses of the job, by *disrupting and disorganizing the work.* Respondent admitted this by testifying that *41 days delay was caused* (p. 1146), making *claim No. 1 about $15,000 but erroneously divided this by 3, the number of gangs.* Mr. Buck's qualification as *expert engineer* and *cost accountant,* far surpassed those of Mr. Stevens, an *employee of respondent.* Compare their qualifications (Mr. Buck, pp. 761-2, with Mr. Stevens, pp. 1139-40). We also invite comparison of their entire testimony for fairness and reasonableness, which accounts for our calling an "outside" engineer, because we wanted a *fair* and *impartial expert witness* and not a mere *biased* and *servile employee.*

Moreover, claimed payment for "grout" is *comparable* with respondent's claim that giving "written orders" for about $450 of *small extras,* should *excuse it from paying* about *$68,000 worth of large extras* which it received and retains; also with its claim in *Blakeslee v. Water Comrs.* 121 *Conn.,* 163, 185, while *negotiations were pending to settle the dispute over extra costs* due to *war conditions,* respondent *pleaded payment* because plaintiffs had signed a receipt for money due on final estimate, which, of course, our Supreme Court brushed aside and upheld recovery of the real damages amounting with interest to about $300,000. This accounts then for respondent's present attitude or habit of *balancing equities* by *setting off* in argument *small* things *to escape payment* for *larger just claims.* In that case, too,

it alleged the *unconstitutionality* of the very Act it had sponsored before the legislature to enable it to pay plaintiff's claim, and denied the authority of its general manager. This was also unsuccessful, as respondent has always been in every case previous to this one.

Blakeslee v. Water Comrs., 106 *Conn.*, 642; 121 *Conn.* 163 p. 80.

No Court in the United States, state or federal, has ever sanctioned the attitude or reasoning of counsel, or else he would have cited at least one case to support his claims. Never has respondent nor other litigant won a case in Connecticut on principles so *unjust* as counsel claims. All modern, and the great weight of authority is opposed to such principles.

Williston on Contracts, Sec. 1972a, Sec. 1479, and cases cited, in this and main Brief.
Xanthakey v. Hayes, 107 *Conn.*, 459, 469ff.

Mr. Buck's testimony, (pp. 761-1202), and his Rebuttal, (pp. 1203ff), is *reasonable* and *logical, fair* and *impartial, supporting fully all of our claims both in theory and in reasonableness;* but the lower Courts exhibited a *capricious disbelief* of his, and all of our testimony; without regard to *reason* and *logic* (when it should have adopted it as the only fair and reasonable construction of the contract and its application) and contrary to the authorities in Connecticut and elsewhere. No type of soil would require preformed cradle (p. 803).

This capricious and unreasonable refusal to credit petitioner's testimony and the Finding and Construction of the contract is *so unreasonable as matters of law as to justify judicial interference.*

Fiengo v. Vitale Inc., 125 *Conn.*, 559.
Deputy v. DuPont, supra.

The *grounds* on which the testimony of respondent's *expert witnesses* rest is so *unreasonable* as to make it *clearly erroneous* to base a decision upon it.

Kulak v. Landers, Frary & Clark, 120 *Conn.,* 606.
Jones v. Jones, 199 *Atl.* (Md.) 513.
Wigmore, Evid., Sec. 659.

Expert testimony must be *too evident for doubt* before it can overcome the *documentary evidence,* here, to which it is opposed.

Berardini v. Kay, 192 *Atl.* (Me) 882.

Respondent's evidence is opposed to all natural laws, common experience, and the weight of reason so this Court may *judicially notice* its *incredibility.*

R. C. L. Evid., Sec. 198; *Am. Jur. Evid.,* Secs. 1183-4.
132 *A. L. R.* 1391.

It was *clearly error* for both Courts to hold, in effect that petitioner must prove *all* of its case *beyond* a *reasonable doubt.*

Esserman v. Madden, 123 *Conn.,* 388.

As the findings were made *under a misconception of the law,* this Honorable Court should render judgment herein despite same.

Freund v. United States, 260 *U. S.* 60.
Gould v. Gould, 78 *Conn.,* 247, 250.
134 *A. L. R.* 1337.
Lone Star Gas Co. v. Fort Worth, 93 *F.* 2d. 584.

No logical reasons exist to allow respondent to escape payment of this, and all other claims, as it, with its *superior knowledge* of the situation, and familiarity with its *own desires, could* have *expressed* its *secret intentions* in a way that would have been *fair* and *equitable to enforce,* because

then the increased expense would have been reflected in the bid.

Respondent *specified* "sills" in *Type C* construction (Ex. A, p. 71, par. 82), and its own witness testified that sills could have been used. (Mr. DeMay, p. 1016). Ex. C shows no sills because it was to be used on piles (pp. 801-803). Common sense and practical reasons dictate it should bear the loss from so *material deviations* from its *own plans*, especially *as there was nothing therein to reasonably notify petitioner that "preformed cradle" would be required.* $22,626 for this claim is too severe a loss to throw on petitioner.

Williston on Contracts, supra.
51 *Yale Law Jour.*, 162ff and cases discussed.
76 *A. L. R.* 268ff and cases discussed.
All other cases discussed herein and main Brief.

CLAIM NO. 2 EXTRA PUMPING, $8345

Respondent seeks to escape payment for this claim because the *broken parallel lines* did not *designate what they represent.* Both Mr. Ciraci and Mr. Buck testified *positively* that here, and in all cases, they *designated* an *existing structure.* Respondent does not *deny* this, so it is to be *taken as true.*

Evans v. Penn. Mut. Life, 186 *Atl.* 133 (Pa.).
109 *A. L. R.* 1517; *Am. Jur. Appeal,* Sec. 896.

Petitioner did not *need* to make *inquiries*-respondent was under the *highest duty* to *disclose* all *material facts;* in fact, it did *represent* that such an *outlet existed.* Petitioner was not required to be *unduly incredulous* nor to act at its *peril,* but was entitled to rely upon these representations and did rely on them.

Water Comrs. v. Robbins, 82 *Conn.,* 623.
E. & F. Construction Co., v. Stamford, 114 *Conn.,* 250, and cases cited.
Freund v. United States, 260 *U. S.* 60, and cases cited.

Mr. Ciraci made *no unwarranted assumption*-respondent is *liable* because it *represented an outlet to exist,* and petitioner could *reasonably assume* it could be *used* to *drain the project affected, in the absence of any notice he could not so use it.*

Horgan v. Mayor, 55 *N. E.* 204.
United States v. Spearin, 248 *U. S.* 132.
Anno. 76 *A. L. R.* 268ff and cases cited.

Petitioner also *reasonably relied* upon Mr. Brewer's *promise it would be ready in six weeks,* and his *promise any extras would be paid for when the sewer was complete,* and did the work without further protest, relying thereon.

Tryon v. White, 62 *Conn.,* 161ff.
United States v. Gibbons, 109 *U. S.* 200.

Respondent did not *expect petitioner to examine the site, nor check up on the underground* (pp. 929, 968-970). Mr. Brewer testified it would have been *fairer* to have made some *notation on the plans that this outlet was not available to drain the work* (p. 915); as he *knew* an *outlet* was of *tremendous importance* (p. 916).

Respondent relied solely on Ex. A, p. 50, par. 29 in its *pleadings,* but when the *unfairness* of such an *interpretation* and the *absence of any notations, reasonably notifying petitioner* of the *true situation* was conceded by its witness, it sought to escape payment through its *secret intention,* it *could not have been used anyway!*—and, by saying petitioner would have had to find out (at its peril, about all of these concealments and non-disclosures, and despite its argument that this was part of a large project) about the *size* and *height* of this outlet. Common sense indicates that its *size* and *height would be such as to receive everything discharged from this* part, as that was the very *purpose* for which it existed—to carry off, by gravity, sewage, etc. *from our section of sewer.*

Mr. Brewer said that no more pumping was done than *any other contractor* would have *had to do,* (p. 936). This does not mean that *we did not do great quantities of extra pumping, over and above the usual amount,* covered by the above provision, but that, *as the plans stood,* with their *admitted shortcomings,* it was necessary to do it to *complete the job.*

Petitioner should certainly not bear the loss in view of this admitted unfairness on the part of the respondent.

Freund v. United States, 260 *U. S.* 60.
Water Comrs. v. Robbins, 82 *Conn.,* 623.
United States v. Spearin, supra.
Anno. 76 *A. L. R.* 268 and cases cited and discussed.

There was no *ground water* on the *plans, except a little north of Crossing No. 4;* all the other was *low meadows, not swampy* (Mr. Brewer, p. 923). The difficulty encountered resulted largely because the underdrains discharged water at the working point, and rains, floods and such water had no place to go, thus immeasurably increasing the cost and expense of this pumping (Mr. Buck, p. 770). (See petition for further testimony with references to pages where found). It is evident that the *only reasonable conclusion* of a *reasoning mind* would be that this *extra expense should be paid by respondent* because it would be *unfair* for petitioner to *bear the loss* under the *admitted facts* on a reasonable construction of the contract.

CLAIM NO. 3. CONFLICTS, WOODSIDE CIRCLE, $11,835.

Both Courts were clearly wrong in failing to distinguish between "supporting" the gas pipe at the side of the trench, and *removing* and *replacing* it because it was encountered at a *materially variant* place than represented on the plans;

and in construing the contract to throw all risk of loss on petitioner because it was an *underground structure,* and it had examined the site. The water main, stone foundation of old house, the sewer and the repavement come under the same principle. This is contrary to all the Connecticut cases cited, and to the law laid down by this Court, and in conflict with the great weight of state and federal Courts' decisions. These cases have already been cited and discussed in this and the main Brief to which reference is here made. 51 *Yale Law Jour.* 162ff, 76 *A. L. R.* 268, and cases cited and discussed therein show that *many theories* prevail for recovery by a contractor where *conditions are not as represented;* backed by the *reasoning* of the Courts *in granting recovery.* Respondent cites only *one* case to support his contention that recovery be denied. That case is distinguishable from this because there plaintiff sued to *rescind the contract;* and not to *recover damages.* It set up *intentional* misrepresentation as the basis of rescission, while we seek to recover on all theories allowed, including innocent misrepresentation, which is *strongly entrenched in Connecticut,* and *elsewhere,* as evolved and discussed in *E. & F. Constr. Co. v. Stamford,* 114 *Conn.,* 250ff, and cases cited therein. Some of the cases were decided by this Honorable Court, upon which our Supreme Court relied, in principle, to support its decision. The cases reach a *just result* regardless of the *theory* of *recovery.* Two cases were decided by the *Second Circuit,* which, prior to the instant decision, seemed to support recovery on similar principles; *Montrose Constr. Co. v. Westchester County,* 80 *F.* 2d, 841, and *United Constr. Co. v. Haverhill,* 9 *F.* 2d 538. Both are well-reasoned cases, and reach an equitable result, whereas, here, the same result is not obtained, although *there seems no reasonable basis for distinction.* Certainly, the *instant case threatens to overthrow our long-settled rules of law of contracts in Connecticut, and to disregard those laid down by this Honorable Court, other Circuits, and other state Courts.* It was *unfortunate* that the Second Circuit should have so

clearly erred in its construction of the contract, and felt it was bound by the Finding, when the *real issues* presented were those of *law* and not of *fact,* and because the Finding was *based on misconceptions of the law,* and *so unreasonable as to be unwarranted in law.*

CASES CITED HEREIN AND MAIN BRIEF.

This reasoning applies equally to claims Nos. 1, 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, and 15, totalling over $62,000 without interest.

A *great many* of the *things encountered were unknown to either party,* as will be seen from discussion of them.

CLAIM NO. 4. STONE FOUNDATION, $428

The total yardage of stone ordered, exclusive of roadways and all other purposes, was 668 Cu. Yds. and respondent paid for 525, leaving 143 Cu. Yds. at $3 or $428. It is a small but just claim. It should be paid under item 17, p. 46, Ex. A.

CLAIM NO. 5. TESTING RIVER CROSSINGS, $2281.

It is well settled in Connecticut and in this Court that respondent impliedly warranted that if petitioner built these Crossings in accordance with its plans they would pass the leakage tests. Admittedly, they were so constructed (pp. 955-6). They did leak, so *respondent is liable* for the *expense of testing and remedying them.*

Hills v. Farmington, 70 *Conn.,* 450
Williston on Contracts, (1924 Ed.) Sec. 1966, and cases, footnote 30
United States v. Spearin, 248 *U. S.* 132

The *contract* placed the *duty of measuring the leakage* on its *Engineer.* Par. 79, p. 68-9, Ex. A. The Engineer

waived or *is estopped to assert this defense* by *waiting so long to make the tests, thus greatly increasing the difficulty and expense after they were completed and backfilled* (pp. 778-780).

CLAIM NO. 6. RELAYING DRIVE DRAIN, $175.

Neither party knew of this drain until encountered. It was *not included in the bid price.* Both Courts *clearly erred* in denying recovery because it was an *underground structure.*

CLAIM NO. 7. ADDITIONAL SHEETING, $575.

The case cited by respondent does not apply, for there the ultimate decision was agreed to reside in the Engineer (par. 87, p. 157). Here the ultimate *liability* was agreed to reside in petitioner in protecting the work. It should have the *ultimate decision* whether it should be left in.

Dock Constr. Co. v. New York, 296 *F.* 377. (2d Cir.).

CLAIM NO. 8. ADDITIONAL REINFORCING STEEL, $199.

Respondent *admitted* (p. 1006) that 600 lbs. of steel was ordered by it but was not paid for. Our records (Ex. H, p. 36) shows 17,328 pounds were used, while 13,330 pounds were paid for, leaving 3,998 pounds not paid for. The loss is $199. While this amount is small, respondent knows very well that Item 16, p. 81, Ex. A governs. (Ex. A, p. 40). It should be paid.

CLAIM NO. 9. SEWER CONFLICTS, $1243.

Building *two extra bulkheads* was necessary because the old sewer *deviated* from the plans. Respondent corroborates

us that *two* were built, while the plans showed only *one.* It was the duty of Mr. Kilby to *direct* this work and instruct where the bulkheads were built. Because his judgment was as erroneous as the plans, respondent asserts it was our fault. There is no fair play in such an attitude. We were delayed two days.

The old brick sewer lying over the new sewer pipe had to be "cut away" and pressure "grouted". This delayed us 4 days. Respondent here gave the "inside" dimensions of the old sewer, whereas everywhere else it gave "outer" dimensions. There was *no* note that this old sewer would have to be cut away, as admittedly "good engineering" requires. (pp. 785, 810-11). Our claim can be *separated, except* as to *materials* which are *$54.05.* It was clearly error to reject the claim for reasons stated, and because it was an *underground structure.* The responsibility of the bulkheads was upon Mr. Kilby as agent of respondent. He was acting for the Engineer whose duty it was to instruct how and where all work was done.

CLAIM NO. 10. PRIVATE DRAIN, $299.

Respondent *paid* for *bypassing this sewer* to the river as an extra. It is *just as liable* for *pumping,* as extra, the *sewage that flowed from it.* It paid for one item. No reason exists why it should not pay the other.

Henderson Bridge Co. v. McGrath, 134 *U. S.* 260
Sartoris v. Utah, 21 *F.* 2d, 1.

CLAIM NO. 11. DIVERTING OLD SEWER, $325.

This was an *unforseen difficulty as well as an underground structure.* The details and extra expense is shown

in Ex. H, p. 41. It was *new and different work*, discussed above. The Engineer had no jurisdiction.

Salt Lake City v. Smith, 104 *F.* 457
Sartoris v. Utah Constr. Co. 21 *F.* 2d 1
137 *A. L. R. Anno*, 542ff.

CLAIM NO. 12. TUNNELING UNDER TREES, $1225.

The trial Court *unjustly* referred to this claim as a striking example of exaggeration (R. p. 40). It is submitted, however, that its construction of this and all other claims was *unjust, inequitable, hard and oppressive.* It would *seem impossible to believe* that a 12 foot tunnel for a 2 foot tree, allowing only 5 feet on each side of such a tree, would be a reasonable distance to protect even its large brace roots, while 50 feet would be necessary to protect all roots. *No tunnel work was shown on the plans here,* so the courts could at least, have awarded reasonable damages for this work.

CLAIM NO. 14. SPECIAL FOUNDATION SEAL, $1843.

If this item is "foundation concrete" as respondent claims —and not "fill" as we claim, it is governed by par. 82, p. 71, Ex. A, where it *definitely says* it shall be *as shown on the plans*, and *on the plans* it is shown 6" thick by Scale on Ex. C. It, therefore, makes no difference which term is used. (Mr. Buck, pp. 816-817). Respondent *admits* its use for *1122.5'* whereas our records show *2345'*. The extra cost was either $1843 or half that sum. The Courts *clearly erred in denying it in toto. Neither party* could have *reasonably contemplated* that such concrete would be mixed and spread by hand in deep cuts handed into the trench by crane, instead of chuting it off the truck in the usual manner.

Salt Lake City v. Smith, supra.

CLAIM NO. 15. WINTER WORK, $14,205.

This claim was *erroneously disallowed because* delays upon which it is based *were found not to have been due to any deviation from the contract terms.* (R. p. 41). *This is a question of law upon a true construction of the contract.* It necessarily follows that since it was *wrongly construed,* this claim should be paid. Mr. Buck, a local Consulting Engineer and Cost Accountant, testified that *all other claims* were reasonable, and likewise as to *this one;* and of the difficulties and expense due to winter conditions. (pp. 789, 791-3). He made a careful check-up to *eliminate duplications* and to see that the claims were *checking properly,* and testified that they were not only good legal, but also good, honest and equitable ones. (791-3). Other facts found by the Court fully corroborate him.

It found completion of the work by *March 31, 1938* (R. p. 44); and deducted liquidated damages after that date. (R. p. 46); it also found *out-of-pocket expenses—exclusive of equipment depreciation and of any profits*—of more than $20,000 in excess of payments. (R. p. 41). This is *logically inconsistent* with *its conclusion* that no *new or different work was done,* especially when the Record is barren of any complaint of respondent the work was "unnecessarily or unreasonably" delayed, or that any other complaint was made under par. M (1), p. 27, Ex. A; it did not plead dissatisfaction, which must be pleaded and proved (Dean v. Conn. Tob. Co. 88 Conn., 619, 624); nor assumption of risk (French v. Mertz, 116 Conn., 18, 21); nor anything else to show *incompetency* or *fault* on our part.

Petitioner's case is, then, *fully symmetrical and balanced in all its parts*—it took *9 months* to complete a *6 months'* contract which exceeds the *time* contemplated by both parties by *50%*; it claims almost exactly *50%* of the *contract price as extras, or new and different work.* The *contract price* is *cogent evidence* of the *value both parties placed on 6 months' work and the reasonable price for it. This is all the more*

reasonable when petitioner *had, in addition,* to *pay approved sub-contractors about $5,000 to complete the work.*

Protests are unnecessary to recovery.

> *United States v. Gibbons,* 109 *U. S.* 200.
> *McCaffrey v. Groton, Etc. Ry. Co.,* 85 *Conn.,* 584, 589-594 and cases cited.

The latter holds that *two real questions* are involved:

1. Whether the work was "without" his contract, and

2. Is defendant bound to pay for it—recovery was allowed. The test is: ought *respondent,* to have *expected* they were to pay for them.

Withdrawal of a bid subjects a party to *liability for damages.* Generally bids are held irrevocable.

> *L. R. A.* 1915 *A,* 225, note and cases cited.
> *Freund v. United States,* 260 *U. S.* 60.
> *Anno.* 104, *A. L. R.* 1149, 22 *R. C. L.* p. 615.

The price shall include clause does not *fairly apply* to *obstructions and difficulties under changed circumstances subsequently arising, though no written order given.*

> *Wood v. Ft. Wayne,* 119 *U. S.* 312.
> *Tompkins v. Bridgeport,* 100 *Conn.,* 147, 154ff.

Both Courts *clearly erred in construing* a letter, Ex. 22, and its answer, Ex. 25 as a *part of the contract.* It was *expressly understood the plans and specifications still controlled.* It could not be *implied* such material changes affecting the rights and remedies of the parties was intended, when no consideration was given and it *substitues nothing* in favor of petitioner.

> *Westinghouse El. Co. v. Binghamton Ry. Co.,* 257 *F.* 726.

Ex. 22 was admitted for *one purpose* only—to show our bid was "unbalanced" and *that* caused all our loss. Its use

for other purposes was *clearly improper,* when respondent was *mistaken,* and it was *undisputed* it resulted in *reducing the loss by $4211.* Anyway, these were written *before* the contract was *executed,* and no mention was made therein about them. They cannot be even considered a part of the contract or used to vary its terms or to vary or increase the rights, remedies or liabilities of the parties.

Highway Constr. Co. v. Miami, 126 *F.* 2d. 777.
Wadeford El. Co. v. Biggs Constr. Co., 116 *F.* 2d. 768.
E. & F. Constr. Co. v. Stamford, 114 *Conn.,* 250, 255-6.

Modification was not pleaded, nor was it *proved;* read together, they show conclusively the *contract was not changed.*

Lientz v. Wheeler, 113 *F.* 2d. 767. Cert. Denied.

None of our claims have a foundation in anything Ex. 22 *referred to.* (See Main Brief, pp. 19-21).

CLAIM NO. 16. LIQUIDATED DAMAGES, $3540.

In *O'Loughlin v. Poli,* 82 *Conn.,* 427, 435, our Supreme Court held that Poli was not entitled to collect liquidated damages because orders were orally given for extra or additional work not contracted for, as necessarily the time for completion over-ran that set; and also that by giving such orders he had waived compliance with the written order provision of the contract. See also the Mahoney case, *supra,* and other cases cited. It is a *penalty provision* and a forfeiture here would be inequitable and against good conscience.

Williston on Contracts, Secs. 789, 850, 793.

The Court found (R. p. 43) that *respondent had promised in two letters to petitioner at least* "consideration" under this clause of the contract, and might well have foregone its claim, but it had not done so. Evidently, the Courts felt, in view of the extensive discretion and contractual powers they erroneously construed to be in the Engineer *relieved respondent from its promise,* and with such *dictatorial powers* they had *no right to interfere,* or it shows that they were biased and prejudiced to such an extent that respondent might escape from payment of this and all other claims, regardless of whether they were written or oral.

Respondent would be entitled to much more respect if it had offered some reason for so *flagrantly breaking its written promise* but it *has not chosen* to do so. This shows beyond question that its Engineer in this and all other claims has neither been fair nor honest in his interpreting the contract nor the law of the contract as a fair-minded and impartial arbiter which is universally required. On the contrary, he and respondent have tenaciously clung to benefits to which respondent is not justly entitled, and though they were derived by errors, misrepresentation, silence, and concealments in material respects as regards the nature, extent, quality, quantity, character and cost of the work to be done under plans admittedly prepared by its experts and which were submitted to bidders and expected them to make them the basis for bids.

Equity has long since perceived it is a kind of fraud to cling to benefits produced by even innocent misrepresentation. Respondent should heed the advice of this Honorable Court in saying:

"They must extricate themselves . . . by purging their business methods of a capacity to deceive . . ."

Fed. Tr. Com. v. Algoma Lbr. Co., 291 *U. S.* 67, 81.

It would be manifestly unfair and unjust for petitioner to suffer such a large loss under the contract, and the admitted and undisputed circumstances of this case, and whether it did or did not comply with the written terms of the contract, which we have shown, we submit, *do not govern.* We are not trying to recover because the contract proved *unprofitable,* but base recovery upon *well-settled principles of law* which *have long been used* in determining *rights and remedies* arising from contracts, and *outside of contracts,* as laid down in applicable decisions of this State, and elsewhere, constituting the *great weight of authority,* and *consonant with reason and justice.* Our claims are based on the principle that it is manifestly fair to recover for unforeseen difficulties and expense encountered because of *obstacles,* and *methods of construction not anticipated and not reasonably within the contemplation of the parties when they made the contract.* On *this basis* we have the *overwhelming weight of authority in this Court, in Connecticut and elsewhere, too numerous to even cite in Briefs.* It is *not surprising* that counsel cites no cases on the *main issues* here because the law and reason are against him, and his position is contrary to those fine qualities dominant in mankind which we have called right-thinking and Equity.

CONCLUSION.

It is respectfully submitted that the applicable decisions of the Supreme Court of Connecticut; of this Honorable Court; of other Circuit Courts of Appeal, and the great weight of authority in State Courts show conclusively that both lower Courts *clearly erred* in construing and applying the contract and petitioner's rights and remedies thereunder; that a harsh, oppressive, unjust and unreasonable construction was placed thereon, when they should have been so determined as to do justice to both parties and to avoid injustice to one, and unjust enrichment to the other; that said Courts clearly erred in all the particulars set forth in

the Petition and the Record, none of which are waived, though brevity forbade their specific inclusion; that the rules of law laid down herein threaten to over-throw the local laws and rights of contract, and remedies thereunder, and, outside of contracts, as applicable to our claims herein set forth, and to introduce therein harsh and oppressive rules of law not heretofore obtaining; it will also tend to influence and over-throw like rules of fair and just laws elsewhere; and that the result reached is *contrary* to those fair and just rules of applicable law as laid down by this Honorable Court.

It would be *far better,* we submit, to *grant this Petition and review the case on its merits,* than to allow such *erroneous judgment to stand,* which might be impliedly construed as approval by this Honorable Court, thus causing the pendulum of justice to swing backwards and away from our fair and just local law long established, as well as from like rules long established in other jurisdictions; this is especially so when every step in the evolution of such applicable law has cost endless and bitter struggles of right against might. *To deny this Petition would tend to clinch innumerable future wrongs in this most important field of law, locally and generally, by making such unconscionable construction of contracts incontestable.*

Respectfully submitted,

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and

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